DOCKET ENTRIES—Continued

Mar. 12, 1935. Affidavit of service of order fixing time for hearing etc. filed.

Mar. 15, 1935. Affidavit of service of motion for Preliminary Injunction etc. filed.

Apr. 15, 1935. Argued sur motion to quash service of writ; to dismiss bill of complaint and for preliminary injunction.

May 1, 1935. Opinion, Kirkpatrick J., dismissing bill of complaint filed.

May 29, 1935. Motion for leave to file amendment to bill of complaint filed.

June 17, 1935. Argued sur motion to amend.

June 25, 1935. Opinion, Kirkpatrick J., granting leave to amend bill and granting motion to quash process filed.

June 25, 1935. Decree granting leave to amend bill, granting motion to quash service of process, denying motion for preliminary injunction and dismissing bill of complaint with costs filed.

July 22, 1935. Order of Court directing that opinion of [fol. 3] Court stand as its findings of fact and conclusions of law filed.

Aug. 5, 1935. Order of Court allowing amendments to bill of complaint nunc pro tunc as of June 25, 1935, filed.

Aug. 5, 1935. Assignments of error filed.

Aug. 5, 1935. Petition for appeal filed.

Aug. 9, 1935. Order of Court allowing appeal filed.

Aug. 9, 1935. Bond for costs sur appeal in $250.00 with Standard Accident Insurance Co. surety, and Order approving bond filed.

Aug. 9, 1935. Copy of notice of appeal filed.

Aug. 9, 1935. Citation allowed and issued.

Aug. 9, 1935. Stipulation of counsel and Order of Court consolidating this case with cause No. 8527 for purpose of appeal filed.

Sept. 9, 1935. Citation returned: "service accepted" and filed.

Sept. 9, 1935. Præcipe for transcript of record sur appeal filed.

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed February 23, 1935

To the Honorable the Judges of Said Court:

Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer, citizens of the State of Pennsylvania, residing in the County of Berks in said State, bring this their Bill of Complaint on their own behalf and on behalf of all other stockholders of Penn National Bank and Trust Company of Reading, who may become parties to and join in the prosecution of this suit, and contribute to the ex-
[fol. 4] pense thereof, against J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, and say:

1. The ground upon which the jurisdiction of this Court depends is that this is a suit in equity for winding up the affairs of a national bank, and is brought by stockholders on a cause of action enuring to a national bank established in this District, under the provisions of the National Bank Act, to enjoin the Comptroller of the Currency and a Receiver acting under his directions as provided by said National Bank Act.

2. Plaintiffs are citizens of the United States residing in the County of Berks in the State of Pennsylvania, and are stockholders of Penn National Bank and Trust Company of Reading, a national banking association organized and existing under and by virtue of the banking laws of the United States, having prior to February 18, 1933 been engaged in general banking business, with principal office and place of business in the City of Reading, County of Berks and State of Pennsylvania.

3. The capital stock of said Penn National Bank and Trust Company of Reading consists of 100,000 shares of the par value of $10 each, and there are approximately 850 shareholders, including plaintiffs, which constitute a class so numerous as to make it impracticable to bring them before this Court and join them in this suit in which the question to be determined is one of common and general interests to all of said class involving the identical points

of fact and law, for which reason plaintiffs bring this suit on behalf of all of such class.

4. Defendant, J. F. T. O'Connor, is Comptroller of the Currency, in the Treasury Department of the United States, [fol. 5] and a resident and inhabitant of the City of Washington in the District of Columbia.

5. Defendant, William H. McGowan, is Receiver of said Penn National Bank and Trust Company of Reading by appointment of the Comptroller of the Currency dated November 26, 1934, and is a resident and inhabitant of the City of Reading, County of Berks and State of Pennsylvania

6. On February 17, 1933 said Penn National Bank and Trust Company of Reading, hereinafter referred to as Penn National Bank, and Reading National Bank and Trust Company, hereinafter referred to as Reading National Bank, entered into an agreement with Farmers National Bank and Trust Company of Reading, hereinafter referred to as Farmers National Bank, national banking associations organized and existing under and by virtue of the banking laws of the United States being then engaged in general banking business with principal offices and places of business in the City of Reading, County of Berks and State of Pennsylvania, wherein among other things, Reading National Bank and Penn National Bank in contemplation of a consolidation with Farmers National Bank agreed forthwith to transfer and assign all of their assets to Farmers National Bank with the right to hypothecate and rehypothecate any or all of such assets, but conditioned upon the assumption by Farmers National Bank of all the deposit liabilities as well as all other liabilities of said Penn National Bank and Reading National Bank excepting liabilities to stockholders as such, which agreement was duly accepted by said Farmers National Bank. A true and correct copy of said agreement is hereto attached, made part hereof and marked Exhibit "A".

[fol. 6] 7. On February 20, 1933 at the direction of the Comptroller of the Currency, said Penn National Bank together with Reading National Bank entered into a supplemental agreement with Farmers National Bank wherein said Penn National Bank and Reading National Bank guar-

anteed to the Farmers National Bank that the assets of their respective banks would in value exceed the deposit liability and other liabilities assumed by said Farmers National Bank by virtue of said agreement of February 17, 1933. A true and correct copy of said supplemental agreement is hereto attached, made part hereof, and marked Exhibit "B".

8. Prior to and at the time of the execution of said agreement of February 17, 1933, said Penn National Bank was subjected to unusual withdrawals of deposits, resulting in a reserve deficiency and placing it on the verge of insolvency and because of such emergency the Board of Directors of said bank by resolution duly authorized the execution of said agreement of February 17, 1933 and the supplemental agreement of February 20, 1933.

9. On February 17, 1933, said Penn National Bank and Reading National Bank transferred and delivered to said Farmers National Bank all their assets, surrendered complete control and possession thereof, as well as their business, and in accordance with the provisions of said agreement said Farmers National Bank appointed executive officers to conduct its business at the former places of business of said Penn National Bank and Reading National Bank under the designation of branches of said Farmers National Bank thereafter with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives, ceased to exercise any control [fol. 7] or dominion over their former assets and ceased to transact any business whatsoever.

10. At the time of the execution of said agreement of February 17, 1933, and the transfer and delivery of all the assets to said Farmers National Bank, the assets of said Penn National Bank covered by said agreement and transferred and delivered as aforesaid consisted of cash on hand and due from banks, securities, loans and discounts, mortgage loans, real estate and other assets, of a value in excess of $6,500,000, which said assets after depreciation of over $1,000,000, represented a fair and reasonable market net value as of said date of over $5,400,000.

11. At the time of the execution of said agreement of February 17, 1933, and the transfer and delivery of all the

assets of said Penn National Bank to Farmers National Bank, the deposit liability together with all other liabilities of said Penn National Bank which were assumed by said Farmers National Bank consisting of demand deposits, time deposits, items due to banks, bills payable and rediscounts and all other liabilities, amounted to approximately $5,100,000.

12. Said Penn National Bank under said agreement of February 17, 1933, transferred and delivered to Farmers National Bank assets having a fair and reasonable value in excess of the deposit liability and all other liabilities of said Penn National Bank in the sum of approximately $350,000, and said Penn National Bank duly performed and complied with all the terms and provisions of said agreement of February 17, 1933 and the supplemental agreement of February 20, 1933, by which said Penn National Bank guaranteed that its assets in value would exceed its deposit and [fol. 8] all other liabilities assumed by said Farmers National Bank.

13. Under the terms and provisions of said agreement of February 17, 1933, and its due performance, as well as the due performance of said supplemental agreement of February 20, 1933, said Farmers National Bank became liable to said Penn National Bank for the payment of all of its deposit liability and all other liabilities of said Penn National Bank, except liabilities to stockholders as such in the total amount of approximately $5,100,000, as well as liable to all depositors and other creditors of said Penn National Bank for the amounts of their respective claims.

14. Immediately upon the execution of said agreement of February 17, 1933, said Farmers National Bank, with its combined resources and liabilities comprising its own original resources and liabilities and those derived from said Penn National Bank and Reading National Bank, carried on and conducted its regular banking business, comingled all its assets regardless of their source or origin and used the same indiscriminately in the conduct of its business and in the discharge of its obligations whether original or assumed.

15. On March 18, 1933, the Acting Comptroller of the Currency, certified that said Farmers National Bank was unable to transact and carry on its ordinary banking busi-

ness, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and that he deemed it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of depositors and other creditors, and thereupon appointed Wellington M. Bertolet, Conservator of said Farmers National Bank under the provisions of the Conservation Act of March 9, 1933.

[fol. 9] 16. Thereupon and on or about March 20, 1933, said Wellington M. Bertolet as such conservator, under the direction of the Comptroller of the Currency, took possession of the books, records and assets of every description of said Farmers National Bank, which included not only the original books, records and assets of said bank, but those acquired by said bank under the terms of said agreement of February 17, 1933, from said Penn National Bank and Reading National Bank, and thereafter said Wellington M. Bertolet as such conservator of said Farmers National Bank pursuant to his duty as such administered all the assets of said Farmers National Bank including the assets which had been derived by said Farmers National Bank from said Penn National Bank and Reading National Bank.

17. On or about October 10, 1933, said J. F. T. O'Connor, Comptroller of the Currency, without notice of any kind to said Penn National Bank, its depositors and other creditors, or the stockholders thereof, and without a hearing, and without warrant or authority of law or a decree or order of any Court of competent jurisdiction, made a ruling to the effect that said agreements of February 17, 1933 and February 20, 1933 were without legal effect, and directed that the transfer and delivery of assets and the assumption of liabilities thereunder should be disregarded, and attempted to allocate among the Farmers National Bank, Penn National Bank and Reading National Bank assets transferred and delivered theretofore to said Farmers National Bank.

18. Said defendant, J. F. T. O'Connor, Comptroller of the Currency, in pursuance of said ruling, thereupon under [fol. 10] date of October 10, 1933, certified that said Penn National Bank and Reading National Bank were unable to transact and carry on their ordinary banking business, or to exercise their usual banking facilities without prejudicing the rights of depositors and other creditors, and that he

deemed it necessary to take immediate steps for the benefit of the depositors and other creditors thereof, and thereupon appointed Wellington M. Bertolet as conservator of the Penn National Bank, and said Wellington M. Bertolet as conservator of Reading National Bank, under the provisions of the Conservation Act of March 9, 1933.

19. Under date of October 20, 1933, said defendant, J. F. T. O'Connor, Comptroller of the Currency, proposed a so-called plan of reorganization of said Farmers National Bank, Penn National Bank and Reading National Bank, based upon his said ruling, providing for the organization of a new national bank and the issuance of stock and securities, a pledge of assets to secure a loan from the Reconstruction Finance Corporation, and a sale of the assets to the new national bank, and a division of the proceeds on the basis of 35% to Farmers National Bank, 25% to Penn National Bank and 25% to Reading National Bank, which division was arbitrary and based on a classification adopted from the report of the National Bank Examiners of April 24, 1933, and not on the basis of the financial condition of said banks as of the date of the execution of said agreement and the transfer of assets and assumption of liability thereunder, to wit, February 17, 1933.

20. Said Wellington M. Bertolet, as conservator of each of said banks, each of which had interests adverse to each other, in furtherance of the socalled plan of reorganization [fol. 11] arbitrarily reconstructed the assets and liabilities of each of said banks as of April 24, 1933, made an arbitrary division thereof among each of said banks, made a sale in gross of certain assets and apportioned the proceeds thereof under the prearranged schedule of 35% to Farmers National Bank, 25% to Penn National Bank and 25% to Reading National Bank.

21. Said Wellington M. Bertolet as conservator of each of said banks, pursuant to instructions of, and in accordance with said ruling of said defendant, J. F. T. O'Connor, Comptroller of the Currency, abrogating said agreements of February 17, 1933 and February 20, 1933, and all rights and obligations thereunder, ignored and disregarded the claims of Penn National Bank in the amount of approximately $5,100,000 against said Farmers National Bank in the re-

construction of the financial condition of said banks, upon which the so-called plan of reorganization was based.

22. Said ruling of said defendant, J. F. T. O'Connor, Comptroller of the Currency, and his acts thereunder abrogating said agreements of February 17, 1933 and February 20, 1933, and all the rights and obligations accrued thereunder was beyond the powers conferred upon him under the National Bank Act or other statutory law, was an unlawful assumption of judicial powers neither delegated to him by statute nor capable of being delegated, and was in violation of the rights of said Penn National Bank, its depositors and other creditors and stockholders thereof, and deprived them of their property without due process of law.

23. After the completion of the so-called plan of reorganization of the three banks, said defendant, J. F. T. O'Connor, Comptroller of the Currency, certified that each of said [fol. 12] banks was insolvent and unable to pay its just and legal debts, and thereupon, on October 27, 1934, appointed Harvey S. Adams as receiver for the Reading National Bank, on November 8, 1934 appointed Edward C. Nolan as receiver for the Farmers National Bank and on November 26, 1934 appointed William H. McGowan as receiver for said Penn National Bank.

24. On January 15, 1935, said defendant, J. F. T. O'Connor, Comptroller of the Currency, made an assessment upon the shareholders of said Penn National Bank, wherein he recited that upon a proper accounting by the Receiver to collect the assets of said bank, and upon a valuation of the uncollected assets remaining in his hands it appeared to his satisfaction that in order to pay the debts of said bank, it was necessary to enforce the individual liability of the stockholders in accordance with the Act of Congress. A true and correct copy of such assessment is hereto annexed, made part hereof, and marked Exhibit "C".

25. Said defendant, J. F. T. O'Connor, Comptroller of the Currency, and said Wellington M. Bertolet, conservator first of said Farmers National Bank and later of said Penn National Bank, and said defendant, William H. McGowan, receiver of said Penn National Bank, failed, neglected and refused to collect said claim of approximately $5,100,000 of

said Penn National Bank against said Farmers National Bank, which was the only and ordinary resource of said Penn National Bank for the payment of its creditors, and on the contrary, without warrant or authority of law, cancelled, abrogated and waived said claim in fraud of the rights of said Penn National Bank, its depositors and other creditors and stockholders thereof, and by reason thereof [fol. 13] failed to comply with the conditions and provisions of the National Bank Act upon which stockholders of a national bank may be assessed.

26. The alleged valuation of the remaining assets made by said defendant, J. F. T. O'Connor, Comptroller of the Currency, upon an alleged proper accounting, on which said assessment upon the stockholders of said Penn National Bank was made, excluded as an asset the said claim of Penn National Bank against Farmers National Bank of approximately $5,100,000 and involved a grave error of law based upon his unwarranted assumption of judicial power in abrogating, cancelling and waiving said claim of Penn National Bank against said Farmers National Bank, and adjudicating the private rights and obligations of parties not subject to his power and control, whereby the said assessment is invalid and illegal.

27. Plaintiffs are without an adequate remedy by any of the ordinary processes of law, and are prohibited by law from making a defense to such assessment on the grounds here alleged, and can secure redress only by interposition of a Court of equity in this proceeding.

28. Said defendant, William H. McGowan, receiver as aforesaid, under instructions from said defendant, J. F. T. O'Connor, Comptroller of the Currency, has notified all stockholders of said Penn National Bank that said assessment is payable on or before February 23, 1935, that those stockholders may have an extension who pay 25% of their said assessment on or before said date, and give their written obligation, satisfactorily guaranteed, to pay 25% on or before March 23, 1935, 25% on or before April 23, 1935, and 25% on or before May 23, 1935. Plaintiffs aver that said defendants unless restrained by this Honorable [fol. 14] Court will institute actions against the shareholders who will be unable to make defense thereto on the ground of the invalidity and illegality of said assessment.

Wherefore plaintiffs pray as follows:

1. That said assessment of said defendant, J. F. T. O'Connor, Comptroller of the Currency, under date of January 15, 1935, in the matter of Penn National Bank and Trust Company upon the shareholders thereof for One Million ($1,000,000.) Dollars be declared invalid, illegal and without warrant or authority of law.

2. That an injunction, preliminary to hearing and final thereafter, issue directed to said defendants, J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank & Trust Company restraining them, and each of them, their agents and attorneys from instituting any proceedings at law or otherwise against said stockholders to enforce said assessment.

3. That a temporary restraining order issue until a motion for preliminary injunction may be heard.

4. For such other and further relief as to this Court may seem proper.

Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Plaintiffs.

*Duly sworn to by Geneva M. Nagle et al. Jurat omitted in printing.*

[fol. 15] I hereby certify that there has not been sufficient time within which to print the foregoing Bill of Complaint.

Lemuel B. Schofield.

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EXHIBIT "A" TO COMPLAINT

Agreement

This agreement entered into this seventeenth day of February A. D. 1933, by and between Farmers National Bank and Trust Co. of Reading, Pennsylvania, of the First part, Reading National Bank and Trust Company of Reading, of the second part, and Penn National Bank and Trust Co. of Reading, state aforesaid, of the third part.

Witnesseth the parties hereto, in consideration of the mutual covenants, promises and agreements, of each of

them to the other, hereby made, and for and in consideration of the sum of One Dollar by each to the other interchangeably paid, receipt whereof is by each of them hereby acknowledged.

[fol. 16] Do hereby covenant, promise and agree to and with each other, as follows, to wit:

1. The said parties hereby agree to merge the three Companies under the name of Farmers National Bank & Trust Company of Reading in the manner hereinafter agreed upon.

2. A committee composed of a representative of each of the Companies shall be appointed forthwith by the Presidents of the respective Companies to act with Lybrand, Ross Brothers & Montgomery, Certified Public Accountants, for the purpose of valuing the assets of each of said companies at their fair valuation which shall be submitted to the Board of Directors of each of the Companies for approval.

3. When said valuations have been determined, the said accountants shall submit a plan for an adjustment of the capital structure of the Farmers National Bank and Trust Co. of Reading, based on the said valuations and thereupon such appropriate legal action as shall be necessary to effect a recapitalization of the combined companies shall be taken by each Company, the stockholders of the Reading National Bank and Trust Company shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies; the stockholders of Farmers National Bank and Trust Co. of Reading shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear [fol. 17] to the total net valuation of the assets of the three companies; and the stockholders of Penn National Bank and Trust Co. of Reading shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies.

4. This agreement is made subject to the approval of the Comptroller of the Currency, and all other Governmental authorities whose consent will be required to comply with all legal requirements.

5. The Reading National Bank and Trust Company and Penn National Bank and Trust Company of Reading shall forthwith execute all necessary documents to transfer and assign all of their assets to Farmers National Bank & Trust Co. of Reading with the right to hypothecate and re-hypothecate any or all of such assets, but conditioned upon the assumption by Farmers National Bank & Trust Co. of Reading of all of the deposit liabilities of the companies as well as all other liabilities thereof, except liability to stockholders as such, reserving the right to collect from the stockholders of Reading National Bank and Trust Company and Penn National Bank and Trust Co. of Reading any liabilities which are owing or which may become owing by virtue of the ownership of their stock in the respective banks.

6. A meeting of the Board of Directors of Farmers National Bank and Trust Co. of Reading shall be held Friday, Feb. 17, 1933, at nine o'clock A. M. to elect proper executive officers to conduct the business at the Reading National Bank & Trust Co. branches and at the Penn National Bank [fol. 18] & Trust Co. of Reading branch of said Farmers National Bank & Trust Company of Reading.

7. All legal papers shall be subject to the approval of the Counsel of the Farmers National Bank and Trust Company of Reading.

8. This agreement shall bind the parties thereto, their successors and assigns.

Farmers National Bank & Trust Co. of Reading, by Ferdinand Thun, Chairman of Board; Chas. T. Cubellis, Asst. to President. Reading National Bank & Trust Company, by H. H. Harrison, President, W. G. Mast, Cashier. Penn National Bank & Trust Co. of Reading, by J. H. Hasbrouck, President, Jere Hess Barr, Secretary; I. F. Impink, H. F. Kantner, Committee.

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EXHIBIT "B" TO COMPLAINT

Supplemental Agreement

This supplemental agreement entered into this 20th day of February, A. D. 1933, by and between Farmers National

Bank & Trust Company of Reading, Pa., of the first part, [fol. 19] Reading National Bank & Trust Company of Reading, of the second part, and Penn National Bank & Trust Company of Reading, state aforesaid, of the third part:

Whereas, the parties hereto entered into an agreement dated February 17th, 1933, and whereas the parties desire to supplement said Agreement,

Now, therefore, this agreement witnesseth

First, That the Penn National Bank and Trust Company of Reading, and The Reading National Bank & Trust Company of Reading hereby guarantee to the Farmers National Bank & Trust Company of Reading That the assets of their respective banks will in value exceed the deposit liability and other liabilities assumed by the Farmers National Bank & Trust Company of Reading, by virtue of said Agreement of Feb. 17, 1933.

This agreement is executed by the officers of each of said banks, they having been duly authorized by their respective Board of Directors.

Farmers National Bank & Trust Company of Reading, —— ——, President; —— ——, Cashier.
Reading National Bank & Trust Company of Reading, —— ——, President; —— ——, Cashier.
Penn National Bank & Trust Company of Reading, —— ——, President; —— ——, Cashier.

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[fol. 20] EXHIBIT "C" TO COMPLAINT

Assessment upon Shareholders

Treasury Department

Office of the Comptroller of Currency

No. 2899

In the Matter of THE PENN NATIONAL BANK AND TRUST CO., Reading, Pennsylvania

Washington, D. C., January 15, 1935.

To All Whom It May Concern:

Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of The Penn

National Bank and Trust Company, of Reading, Pennsylvania, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed in Section 5151 and 5234 of the Revised Statutes of the United States, Section 1 c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Penn National Bank and Trust Company, of Reading, Pennsylvania, for One Million ($1,000,000.) Dollars, to be paid by them on or before the 23rd day of February, 1935, and I hereby make demand upon each and every one of them for the par value of each and every share of capital stock of said association held or owned by them, respectively, at the time of its failure; and [fol. 21] I hereby direct Wm. H. McGowan, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In Witness whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this 15th day of January, A. D. 1935.

J. F. T. O'Connor, Comptroller of the Currency.
(Seal.)

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IN UNITED STATES DISTRICT COURT

DUPLICATE ORIGINAL SUBPŒNA—Returned and Filed Mar. 5, 1935

The President of the United States of America to J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpœna at the Clerk's office of the United States District Court for the Eastern District of Pennsyl-

vania, at Philadelphia to answer unto the bill of complaint of Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable the United States District Judges [fol. 22] at Philadelphia this 23rd day of February A. D. 1935.

George Brodbeck, Clerk, by (S.) E. G. Johnson, Deputy Clerk. (Seal.)

— Memorandum

The Defendants in this case are required to file an answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

Return on Service of Writ

United States of America,
District of Columbia, ss:

I hereby certify and return, that on the 27th day of February, 1935, I received the within subpœna and served copy of the same, together with the bill of complaint in said case, on J. F. T. O'Connor, Comptroller of the Currency, by personal service of the same on Gibbs Lyons, Deputy Comptroller of the Currency, February 27, 1935.

(Sgd.) John B. Colpoy, United States Marshal, by (Sgd.) Harry Callen, Deputy United States Marshal.

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In United States District Court

Motion to Dismiss Bill of Complaint—Filed March 8, 1935

Comes now the defendant William H. McGowan, Receiver of the Penn National Bank & Trust Company, and respect- [fol. 23] fully moves this Honorable Court to dismiss the bill of complaint filed herein, upon the following grounds:

1. The said bill of complaint does not state facts sufficient to entitle plaintiffs to any relief, there being no equity stated in the bill.

2. The said bill of complaint shows on its face that the levying of the assessment by the Comptroller of the Currency on the stockholders of the Penn National Bank and Trust Company, as to which relief is sought, was done in pursuance of the administrative jurisdiction, discretion and judgment of the Comptroller of the Currency, and that the Comptroller of the Currency, in so acting, exercised the official discretion vested in him by law in the premises, and that this Court should not disturb such discretionary acts.

3. The said bill of complaint seeks to attack the validity and effect of acts performed by administrative and executive officers of the Federal Government within the course of their official discretion and duty.

4. Upon the facts covered in said bill of complaint this Court, in exercising its discretion as to the injunctive relief sought, should deny such relief and dismiss the bill.

5. The bill of complaint states no cause of action against this defendant, nor are the averments thereof sufficient to entitle plaintiffs to the relief sought.

6. The bill of complaint is multifarious.

7. The averments of said bill, upon which the right to the relief sought is based, are merely statements of conclusion of law and of fact.

8. The said bill shows on its face that it constitutes a collateral attack on the validity of the stock assessment [fol. 24] levied by the Comptroller of the Currency in the course of his administrative discretion and authority.

9. The bill of complaint shows on its face that the stock assessment is valid and that the validity of such assessment can not be contested in this action.

10. The averments of said bill are to the effect that if certain alleged causes of action are pursued, or if certain alleged agreements are performed there will be no occasion or necessity for an assessment and that there will be sufficient to pay the creditors in full, all of which constitute conclusions of law and of fact, and further constitute an attempt to attack collaterally the finding by the Comptroller of insolvency of the bank and of the necessity for

an assessment, the determination of all of which matters is vested by law exclusively in the Comptroller, whose determination of such matters is not open to attack or to review by this Court under the facts averred in said bill of complaint.

11. The said bill of complaint shows upon its face that the acts and matters complained of, as to which relief is sought, were embraced within the exclusive official and administrative jurisdiction, discretion and control of the Comptroller of the Currency, and that the Comptroller in so acting exercised the official and administrative discretion vested in him by law in the premises, and that this Honorable Court is precluded from reviewing or disturbing the findings, conclusions and acts of the Comptroller of the Currency in such matters.

12. That said bill shows on its face that the plaintiffs have been guilty of laches.

13. That if such alleged merger had been effected the stockholders of the Penn National Bank and Trust Company would not have been legally entitled to notice, as is [fol. 25] suggested in said bill of complaint (paragraph 19).

14. The bill of complaint shows on its face that this was not a legal consolidation under the Act of November 7, 1918, as amended, requiring the Comptroller's certificate of approval, nor does said bill show that the Comptroller was a party to said alleged merger, or that he authorized or consented to it, or that he ratified it, or that he officially or otherwise approved it.

15. And for other and further reasons apparent in said bill of complaint.

Harry R. Matten, Charles W. Matten, Charles C. Wainwright, Attorneys for Defendants.

STATE OF PENNSYLVANIA,
County of Berks, ss:

William H. McGowan being duly sworn according to law, deposes and says that he is one of the defendants in the above case and that the foregoing Motion to Dismiss Bill

of Complaint is not made for delay but because he verily believes complainants have no legal cause of action.

William H. McGowan.

Sworn and subscribed to before me this Seventh day of March, A. D. 1935. Kathryn G. Sauer, Notary Public. My commission expires March 5, 1937. (Seal.)

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[fol. 26] IN UNITED STATES DISTRICT COURT

MOTION TO QUASH PROCESS—Filed March 8, 1935

Comes now J. F. T. O'Connor, as Comptroller of the Currency, defendant in the above entitled cause, by his attorneys, appearing solely for the purpose of challenging the jurisdiction of the Court over said defendant and for no other purpose, and respectfully moves this Honorable Court to quash and subpœna and process issued in this cause on February 23, 1935, pursuant to which said defendant was served by the United States Marshal in and for the District of Columbia on February 27, 1935, and to dismiss said bill of complaint as to this defendant, upon the following grounds:

1. Service of process was not had on said defendant in the Eastern District of Pennsylvania.

2. Service of process on said defendant was not made by the United States Marshal for and in the Eastern District of Pennsylvania.

3. The said defendant is not an inhabitant or resident of the Eastern District of Pennsylvania within the purview of Title 28, Section 112 United States Code Annotated, which requires all civil suits to be brought in the district court of the district whereof the defendant is an inhabitant.

4. And for other reasons apparent of record.

Charles E. Wainwright, Harry R. Matten, Charles W. Matten, Attorneys for Defendant J. F. T. O'Connor, Comptroller of the Currency.

[fol. 27] IN UNITED STATES DISTRICT COURT

APPEARANCE—Filed March 8, 1935

To the District Court of the United States for the Eastern District of Pennsylvania:

The Clerk of this Court will please enter our appearance de bene esse as attorneys for J. F. T. O'Connor, Comptroller of the Currency of the United States.

(Sgd.) Chas. W. Matten, Harry R. Matten, Attorneys for J. F. T. O'Connor, Comptroller of the Currency.

Dated March 8, 1935.

To George Brodbeck, Clerk.

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IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION TO DISMISS BILL OF COMPLAINT—Filed May 1, 1935

This suit in equity is an effort upon the part of stockholders of a closed National Bank to avoid meeting their statutory liability. The bill of complaint discloses nothing which takes the case out of the well established rule, which has been the basis of scores of decisions, that the determination made by the Comptroller of the Currency as to the insolvency of a bank and the necessity for an assessment are administrative matters to be determined by him and not ordinarily reviewable by the Court. See Wilson vs. Awalt, 2 Fed. Sup. 465, and cases there cited.

[fol. 28] The bill alleges fraud, but it is elementary that general charges of fraud are not sufficient unless the facts pleaded show that the transactions to which the epithet is applied are actually fraudulent. Wanamaker vs. Edisto Bank, 62 Fed. (2nd) 696.

The right to proceed against stockholders to collect the assessment is committed to the receiver. It will be noted that there is nothing in the Statute (U. S. C. Title 12, Sections 191-192) which requires preliminary action by the Comptroller except the general words "under the direction of the Comptroller" which appear in Section 192. From

an early date however the courts have read into the act the requirement that the receiver's action must be preceded by a determination by the Comptroller of the necessity for and the amount of the assessment. See Kennedy vs. Gibson, 74 U. S. 498, 505. Bank vs. Kennedy, 17 Wall. 19.

The plaintiffs rely upon a dictum in the opinion in U. S. vs. Knox, 102 U. S. 422 which they interpret as meaning that if the comptroller, in ascertaining the amount of the assessment, fails to take into consideration ("exhaust") all the assets of the bank, a court of equity will act by injunction to restrain subsequent proceedings. Whatever may have been intended by this statement, it is perfectly clear from the later decisions that it was never meant that the stockholders could institute an inquiry into the correctness of the Comptroller's determination, and proceed to fix the amount of their liability as on an accounting, by a proceeding in equity, pending which, suits are to be stayed. Such interpretation would utterly defeat the whole purpose of the policy involved which is to "expeditiously and justly wind up the affairs and the paying of debts of National [fol. 29] Banks". Kerby vs. Springfield Inst. etc., 245 U. S. 330, 333. Miller vs. Stock, 85 Fed. 2nd 773.

But, beyond all this, even if the right of the plaintiffs to attack the Comptroller's determination in this proceeding were to be conceded to the full extent claimed (which obviously it cannot be) and assuming that the bill is intended as a direct attack upon the Comptroller's action based on fraud, excess authority, error of law or anything else that the plaintiffs claim would invalidate that action, the facts alleged by the bill entirely fail to show any ground for relief. What happened, as averred in the bill, was that when the bank was closed and a conservator appointed, its assets had already been sold and transferred to another bank (Farmers National Bank) which in turn had agreed to pay all the deposit liabilities of the former. Thus, the only asset it had was this obligation of the Farmers National Bank. It will be noted that the bill avers that the assets transferred were worth some $350,000 in excess of the deposit liabilities.

Now, says the bill, the Comptroller, without legal right, disregarded this state of affairs, rescinded the contract and, in determining the bank's financial condition, allotted to it twenty-five per cent of all the assets held by the Farmers Bank, representing the combined resources of

three merged banks. In other words, in making the determination the Comptroller balanced the deposit liabilities of the bank against twenty-five per cent of a certain pool of assets (value not stated) instead of balancing them against the obligation of the Farmers Bank to pay them. No one can tell from the bill what the value of that obligation was, nor does it appear how much the alleged arbitrary allocation of assets amounted to. The only thing that does [fol. 30] appear is that the deposit liabilities were $5,100,000.

Granted that the Comptroller should have taken the situation as it existed when the Bank closed instead of proceeding to undo and unscramble the assets, there is absolutely nothing to show that, as a matter of assets and liabilities, these stockholders have suffered by the method adopted by the Comptroller. Whether the agreement of the Farmers Bank to pay deposit liabilities was worth more or less than the assets which were allocated in its place is not shown. Inferentially, it would not appear to have been worth its face value since the Farmers Bank was also in receivership and is now in process of reorganization.

The conclusion is that under any view the bill must be dismissed.

This conclusion makes it unnecessary to pass upon the motion to quash process served upon the Comptroller.

By the Court.

(Sgd.) W. H. Kirkpatrick, J.

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IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO FILE AMENDMENT TO BILL OF COMPLAINT—Filed May 29, 1935

And now, to wit, this 29th day of May A. D., 1935, come the plaintiffs, by their attorneys, and move the Court for leave to amend their Bill of Complaint, as follows:

1. By adding a new paragraph after Paragraph 14, and before Paragraph 15 of the Bill, to be designated as Paragraph 14 a, to read as follows:

14 (a) At the time of the execution of said agreement of February 17, 1933, the assets of said Farmers' National

[fol. 31] Bank were of a nature similar in character to those of said Penn National Bank, and had a book value of approximately $9,500,000., which after a deduction for depreciation of approximately $1,500,000., represented a fair and reasonable net market value of approximately $8,000,000., as against liabilities to creditors of approximately $9,000,000., and a liability to stockholders on its capital stock of $1,000,000; that the general claim of said Penn National Bank under said Agreement of February 17, 1933, included not only the obligation of said Farmers National Bank to said Penn National Bank and to the depositors and other creditors of said Penn National Bank, and also the liability of the stockholders of said Farmers National Bank to assessment on the capital stock of $1,000,000., but in addition the assets of said Penn National Bank transferred and delivered to Farmers National Bank as aforesaid, and the commingled assets of said Penn National Bank and Farmers National Bank, were subject to an equitable lien and charge in favor of said Penn National Bank and its creditors, and constituted a trust fund for their benefit, and the said general claim of the said Penn National Bank against the Farmers National Bank as thus constituted was then and now is more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities of said Penn National Bank without the necessity of any assessment upon the stockholders of the Penn National Bank.

2. By striking out the following words in Paragraph 19 of the Bill: "and a division of the proceeds on the basis of 35% to Farmers National Bank, 25% to Penn National [fol. 32] Bank, and 25% to Reading National Bank," and in lieu thereof to insert "in consideration for which the new National Bank was to establish on its books lump sum credits for the benefit of the Conservator of each of said banks in an amount sufficient to permit a distribution to be made to the depositors and other creditors of each of said banks in the following percentages of the claims against each of said banks, 35% to Farmers National Bank, 25% to Penn National Bank and 25% to Reading National Bank."

(Sgd.) George C. Eaves, Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Plaintiffs.

And now, to wit, this — day of —— A. D., 1935, in consideration of the foregoing Motion, the Court grants leave to the plaintiffs to amend their Bill as therein stated.

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IN THE UNITED STATES DISTRICT COURT

STIPULATION RE MOTION TO DISMISS—Filed September 9, 1935

It is hereby stipulated by and between the above-entitled parties, by their respective attorneys, that the motion to dismiss the original bill of complaint heretofore filed in the above entitled cause shall stand and be adopted and con- [fol. 33] sidered in all respects as a motion to dismiss the amended bill of complaint herein.

(Sgd.) George Eaves, Attorney for Plaintiffs. (Sgd.) Charles E. Wainwright, Attorney for Defendants.

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IN THE UNITED STATES DISTRICT COURT

OPINION SUR MOTION TO AMEND BILL OF COMPLAINT, MOTION TO QUASH PROCESS AND REARGUMENT SUR MOTION FOR PRELIMINARY INJUNCTION—Filed June 25, 1935

Before W. H. KIRKPATRICK, J.

The allowance of amendments was urged upon grounds which amounted in substance to a request to supply matter inadvertently omitted by the pleader. The plaintiff ought to have the benefit of all the facts which he can properly aver. The amendments will be allowed. However they do not affect in the slightest degree the conclusion reached by the Court.

It may be that the remarks contained in the latter part of the opinion filed would not apply to the amended bill, and they may be disregarded. The amendments however merely emphasize the thought expressed in the fourth paragraph of the opinion—namely, that relief asked for necessarily depends upon an immensely complicated accounting by the Court in this proceeding to determine the question whether the Penn Bank was or was not really solvent at the time of the Comptroller's determination—a proceeding which ob-

viously involves countless questions not only of fact but of [fol. 34] law. For example the assets transferred to the Farmers National Bank would have to be valued; the assets and liabilities of the Farmers Bank itself would have to be considered in order to determine how much its alleged agreement to assume the deposit liabilities of the Penn Bank was worth; the agreement itself would have to be construed and the legal question whether or not it created an equitable lien in favor of the Penn Bank in the transferred assets would have to be determined.

The whole basis of the bill is that the Comptroller's determination of the necessity for an assessment was incorrect. Admittedly, if the bank was insolvent the Comptroller's determination was a correct one, no matter by what process he arrived at it. The quasi-contractual liability which the law imposes upon holders of stock of a national bank includes the liability to assessment if and when the Comptroller exercising his discretion, without fraud, determines that an assessment is necessary. The financial condition of the bank can never be estimated accurately except by the process above referred to and it is not the stockholders' right to demand this proceeding until the time for it arrives in the final winding up of the bank's affairs. To do so now, and to stay suits pending the result would be to reverse the whole system set up by the legislation upon this point and to destroy its efficacy as a means of promptly collecting the bank's assets so that they can be applied to its debts.

I did not dispose of the motion to quash the process because, in view of the fact that the bill was dismissed, I thought it unnecessary. However, both parties wish this motion disposed of. Under the authority of Wilson vs. Awalt, 2 Fed. Sup. 465, the writ will be quashed.

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[fol. 35] In United States District Court

Order Sustaining Motion to Dismiss and Denying Motion for Preliminary Injunction—Filed June 25, 1935

This cause coming on to be heard on April 15, A. D. 1935, on motion of defendant J. F. T. O'Connor, as Comptroller of the Currency to quash service of subpœna and process, and upon motion of the defendant William H. Mc-

Gowan as Receiver of the Penn National Bank and Trust Company of Reading, to dismiss plaintiffs' bill of complaint and upon motion of plaintiffs for preliminary injunction, and further coming on to be heard on May 29, 1935, and on June 17, 1935, on motion for leave to amend the original bill of complaint herein, and said motions having been argued respectively by counsel in open court and upon consideration thereof, it is by the Court this 25th day of June, A. D. 1935

Ordered, adjudged, and decreed, that said motion for leave to amend the original bill of complaint herein, be and the same hereby is granted, and that said motion to quash service of subpœna and process on defendant J. F. T. O'Connor, Comptroller of the Currency be and the same hereby is sustained, and that said motion to dismiss plaintiffs' amended bill of complaint be and the same hereby is sustained, and that plaintiffs' amended bill of complaint filed herein be dismissed as to both defendants, and that defendants recover their proper costs and that plaintiffs be adjudged to pay all proper costs incurred by said defendants in this cause, for which let execution issue; and it is further

Ordered, adjudged and decreed, that plaintiffs' motion [fol. 36] herein for a preliminary injunction be and the same hereby is denied.

(Sgd.) W. H. Kirkpatrick, United States District Judge.

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IN UNITED STATES DISTRICT COURT

ORDER DIRECTING THAT OPINION OF COURT STAND AS ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 22, 1935

And now, to wit July 20, 1935, on motion of the above-named plaintiffs, it is Ordered that the opinions of this Court rendered in the above-entitled suit on the motion to dismiss, the bill of complaint herein, and the motion to quash the subpœna and set aside the service thereof, may stand as the findings of fact and conclusions of law in accordance with the provisions of Equity Rule 70½.

(Sgd.) W. H. Kirkpatrick, J.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING AMENDMENTS TO BILL OF COMPLAINT NUNC PRO TUNC AS OF JUNE 25, 1935—FILED AUGUST 5, 1935

And now, to wit, July 31, 1935, on consideration of the motion of plaintiffs for leave to file amendments to the bill of complaint herein as therein stated, said motion is granted, and said proposed amendments shall stand as amendments to said bill of complaint nunc pro tunc as of June 25, 1935.

(Sgd.) W. H. Kirkpatrick, United States District Judge.

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[fol. 37] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—FILED AUGUST 5, 1935

Now come the plaintiffs in the above entitled cause and file the following assignments of error upon which they rely in the prosecution of their appeal in the above entitled cause from the Order and Decree made and entered by this Honorable Court on the 25th day of June, 1935.

1. The Court erred in sustaining the motion to dismiss the Bill of Complaint herein by deciding that the facts alleged do not entitle plaintiffs to relief.

2. The Court erred in sustaining the motion to quash service of process on the Comptroller of the Currency by deciding that the suit was brought by individuals and not by a national bank.

3. The Court erred in its conclusion as follows: (Supp. Op. par. 3)

"The whole basis of the bill is that the Comptroller's determination of the necessity for an assessment was incorrect."

4. The Court erred in not holding that the determination by the Comptroller as to the propriety and amount of an assessment on stockholders is subject to a direct attack by a suit in equity where such determination is beyond the authority of the Comptroller, violates the requirements of due process, or is arbitrary and capricious.

5. The Court erred in not holding that the determination by the Comptroller as to the propriety and amount of an assessment, is subject to the condition precedent that the ordinary resources of the bank be first exhausted, and a deficit thereby established.

6. The Court erred in not finding that the only and or- [fol. 38] dinary resources of the bank consisted of its rights under a valid contract with the Farmers' Bank covering the transfer of all assets to, and the assumption of all liabilities by, the Farmers' Bank, that said resources were more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities without the necessity of an assessment, that such resources had not been exhausted, and that no deficit in fact existed.

7. The Court, in failing to assume as true the facts properly alleged in the Bill of Complaint and amendments thereto, erred in its conclusion as follows: (Supp. Op. par. 2)

"The amendments however merely emphasize the thought expressed in the fourth paragraph of the opinion—namely that relief asked for necessarily depends upon an immensely complicated accounting by the Court in this proceeding to determine the question whether the Penn Bank was or was not really solvent at the time of the Comptroller's determination—a proceeding which obviously involves countless questions not only of fact but of law. For example the assets transferred to the Farmers National Bank would have to be valued; the assets and liabilities of the Farmers' Bank itself would have to be considered in order to determine how much its alleged agreement to assume the deposit liabilities of the Penn Bank was worth; the agreement itself would have to be construed and the legal question whether or not it created an equitable lien in favor of the Penn Bank in the transferred assets would have to be determined."

8. The Court erred in not finding that the Comptroller without right or authority prior to the assessment made a [fol. 39] ruling abrogating the valid contract between the bank and the Farmers' Bank and all rights thereunder, under which ruling the said contract and all rights thereunder were abandoned as assets of the bank without any

attempt to enforce, collect or value the same, and were ignored and disregarded in the making of the assessment by the Comptroller.

9. The Court erred in not holding that the assessment by the Comptroller was beyond his authority, violated the requirements of due process and was arbitrary and capricious.

10. The Court erred in its conclusion that the Bill of Complaint alleged fraud in general terms.

11. The Court erred in its conclusion as follows: (Supp. Op., par. 3)

"Admittedly, if the bank was insolvent the Comptroller's determination was a correct one, no matter by what process he arrived at it."

12. The Court erred in its conclusion as follows: (Supp. Op. Par. 3)

"The financial condition of the bank can never be estimated accurately except by the process above referred to and it is not the stockholders' right to demand this proceeding until the time for it arrives in the final winding up of the bank's affairs."

Wherefore the appellants pray that said decree be reversed and for such other and further relief as may be proper.

George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants, by Lemuel [fol. 40] B. Schofield.

August 5th, 1935.

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IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed August 5, 1935

To the Honorable Judges of the Said Court:

The above-named plaintiffs feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of June, 1935 do hereby appeal from said decree to the Circuit Court of Appeals for the Third Cir-

cuit for the reasons set forth in the assignments of error filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, under the rules of said court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them be made.

George Eves, Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Petitioners, (Sgd.) by Lemuel B. Schofield.

August 5th, 1935.

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ORDER ALLOWING APPEAL

Appeal allowed upon giving bond in the sum of $250., to be approved by the Clerk of the District Court, conditioned [fol. 41] for the payment of costs on appeal.

(Sgd) O. B. Dickinson, *J.*

August 9, 1935.

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IN UNITED STATES DISTRICT COURT

CITATION—Filed August 9, 1935

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UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, Eastern District of Pennsylvania, wherein Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer, are appellants,

and you are appellees to show cause, if any there be, why the Decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable O. B. Dickinson, Judge of the District Court of the United States, this 9th day of August, in the year of our Lord one thousand nine hundred and thirty-five.

O. B. Dickinson, District Judge.

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STIPULATION

It is hereby stipulated by and between Stevens & Lee, [fol. 42] Edw. D. Trexler, W. Bradley Ward, George Eaves, and Lemuel B. Schofield, Attorneys for the appellants in the above entitled cause, and Charles E. Wainwright, attorney for appellee, that service of citation on appeal dated August 9, 1935, is accepted as to the appellee J. F. T. O'Connor, Comptroller of the Currency of the United States, for the sole and only purpose of permitting a review on appeal of the action of the Trial Court in sustaining a motion of appellee O'Connor to quash service of subpoena and process.

It is further stipulated by and between Counsel for appellants and appellee that the service of said citation on appellee, so far as the appellee O'Connor is concerned, is not to be construed as permitting a review of the case on the merits, and the acceptance of such service is to be limited to the purposes above stated, and no other.

(Sgd.) Stevens & Lee, Edw. D. Trexler, Geo. Eaves, W. Bradley Ward, Lemuel B. Schofield, (Sgd.) Charles E. Wainwright, Attorney for Appellee.

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IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER OF CONSOLIDATION—Filed August 9, 1935.

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the appeals in the above entitled suits be and the same are hereby consolidated,

and that a joint record shall be printed, and that an order [fol. 43] may be entered to that effect without any further notice.

George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants, by (Sgd.) Lemuel B. Schofield, Chas. W. Matten, Chas. Wainwright, Attorneys for Appellees.

August 9th, 1935.

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ORDER

Before DICKINSON, J.

It is ordered by this Court that Cause No. 8525 In Equity entitled Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer, Plaintiffs vs. J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Defendants, and Cause No. 8527 In Equity, entitled J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, Plaintiffs vs. J. F. T. O'Connor, Comptroller of The Currency and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, Defendants, be and the same are hereby consolidated for the purpose of appeal, and that a joint record may be printed.

By the Court;
Attest:

Leo A. Lilly, Deputy Clerk.

August 9, 1935.

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[fol. 44] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD—Filed September 9, 1935

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to an appeal allowed in the above entitled proceedings, and to include in such transcript the following:

1. Bill of Complaint.
2. Duplicate Original Subpoena.
3. Return of Service of Duplicate Original Subpœna.
4. Motion to Dismiss Bill of Complaint.
5. Motion by J. F. T. O'Connor, Comptroller to Quash Subpœna.
6. Appearance de bene esse of Charles W. Matten and Harry R. Matten for J. F. T. O'Connor, Comptroller.
7. Opinion, Kirkpatrick, J., dismissing Bill of Complaint.
8. Motion for leave to file Amendment to Bill of Complaint with proposed amendment.
9. Stipulation of counsel regarding motion to dismiss amended bill of complaint.
10. Opinion, Kirkpatrick, J., granting leave to amend Bill and Granting Motion to Quash Process.
11. Decree of June 25, 1935, granting leave to amend Bill, granting Motion to Quash Service of Process, denying Motion for Preliminary Injunction and dismissing Bill of Complaint with costs.
12. Order of Court directing that Opinions of Court stand as its findings of fact and conclusions of law.
[fol. 45] 13. Order of Court allowing Amendments to Bill of Complaint nunc pro tunc.
14. Assignments of Error.
15. Petition for Appeal and Order allowing same.
16. Citation on Appeal and Acknowledgment of Service.
17. Stipulation of counsel regarding appellee J. F. T. O'Connor, Comptroller of the Currency.
18. Docket Entries.
19. Praecipe for Transcript.
20. Certificate of Clerk

and file said transcript with the Clerk of the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, (Sgd.) Lemuel B. Schofield, Attorneys for Appellants.

Aug. 26, 1935.

We hereby acknowledge receipt of a copy of the Praecipe for Record of which this is the original.

(Sgd.) Chas. W. Matten, Charles E. Wainwright, Attorneys for Appellees.

August 27, 1935.

[fol. 46] In United States District Court for the Eastern District of Pennsylvania, December Term, 1934

No. 8527

J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith

vs.

J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank & Trust Company of Reading

Docket Entries

Feb. 23, 1935. Bill of Complaint filed.

Feb. 23, 1935. Subpoena exit—returnable March 15, 1935.

Feb. 23, 1935. Duplicate original subpoena exit—returnable March 15, 1935.

Mar. 5, 1935. Subpoena returned "Served on February 27, 1935" and filed.

Mar. 5, 1935. Duplicate original subpoena returned "Served on February 27, 1935" and filed.

Mar. 8, 1935. Motion by H. S. Adams to dismiss Bill of Complaint filed.

Mar. 8, 1935. Appearance of Chas. W. Matten and Harry R. Matten Esqs. for H. S. Adams, Receiver etc. filed.

Mar. 8, 1935. Motion by J. F. T. O'Connor, Comptroller etc. to quash subpoena, filed.

Mar. 8, 1935. Appearance de bene esse of Charles W. Matten and Harry R. Matten, Esqs. for J. F. T. O'Connor, Comptroller etc. filed

[fol. 47] Mar. 9, 1935. Affidavit of service of copies of motion to dismiss and motion to quash etc. filed.

Apr. 15, 1935. Argued sur motions to quash service of writ; to dismiss bill of complaint; and for preliminary injunction.

May 6, 1935. Memorandum Opinion, Kirkpatrick J., dismissing Bill filed.

May 29, 1935. Motion for leave to file amendment to bill of complaint filed.

June 17, 1935. Argued sur motion to amend.

June 25, 1935. Memorandum Opinion, Kirkpatrick J., sur motion to amend bill and motion to quash service of process filed.

June 25, 1935. Decree granting leave to amend bill, grant-

DOCKET ENTRIES—Continued

ing motion to quash service of process, denying motion for preliminary injunction and dismissing bill of complaint with costs filed.

July 22, 1935. Order of Court directing that opinion of Court stand as its findings of fact and conclusions of law filed.

Aug. 5, 1935. Order of Court allowing amendment to bill of complaint nunc pro tunc as of June 25, 1935, filed.

Aug. 5, 1935. Assignments of error filed.

Aug. 5, 1935. Petition for appeal filed.

Aug. 9, 1935. Order of Court allowing appeal filed.

Aug. 9, 1935. Bond for costs sur appeal in $250.00 with Standard Accident Insurance Co. surety and Order approving bond filed.

Aug. 9, 1935. Copy of notice of appeal filed.

Aug. 9, 1935. Citation allowed and issued.

Aug. 9, 1935. Stipulation of counsel and Order of Court [fol. 48] consolidating this case with cause #8525 for purpose of appeal filed.

Sept. 9, 1935. Citation returned "service accepted" and filed.

Sept. 9, 1935. Præcipe for transcript of record sur appeal filed.

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IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—February 23, 1935

To the Honorable the Judges of Said Court:

J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, citizens of the State of Pennsylvania, residing in the County of Berks in said State, bring this their Bill of Complaint on their own behalf and on behalf of all other stockholders of Reading National Bank and Trust Company of Reading, who may become parties to and join in the prosecution of this suit, and contribute to the expense thereof, against J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, and say:

1. The ground upon which the jurisdiction of this Court depends is that this is a suit in equity for winding up the

affairs of a national bank, and is brought by stockholders on a cause of action enuring to a national bank established in this District, under the provisions of the National Bank Act, to enjoin the Comptroller of the Currency and a Receiver acting under his directions as provided by said National Bank Act.

2. Plaintiffs are citizens of the United States residing in the County of Berks in the State of Pennsylvania, and are stockholders of Reading National Bank and Trust Com-
[fol. 49] pany of Reading, a national banking association organized and existing under and by virtue of the banking laws of the United States, having prior to February 18, 1933 been engaged in general banking business, with principal office and place of business in the City of Reading, County of Berks and State of Pennsylvania.

3. The capital stock of said Reading National Bank and Trust Company of Reading consists of 60,000 shares of the par value of $10.00 each, and there are approximately 500 shareholders, including plaintiffs, which constitute a class so numerous as to make it impracticable to bring them before this Court and join them in this suit in which the question to be determined is one of common and general interest to all of said class involving the identical points of fact and law, for which reason plaintiffs bring this suit on behalf of all of such class.

4. Defendant, J. F. T. O'Connor, is Comptroller of the Currency, in the Treasury Department of the United States, and a resident and inhabitant of the City of Washington in the District of Columbia.

5. Harvey S. Adams, is Receiver of said Reading National Bank and Trust Company of Reading by appointment of the Comptroller of the Currency dated October 27, 1934, and is a resident and inhabitant of the City of Reading, County of Berks and State of Pennsylvania.

6. On February 17, 1933 said Reading National Bank and Trust Company of Reading, hereinafter referred to as Reading National Bank, and Penn National Bank and Trust Company of Reading, hereinafter referred to as Penn National Bank, entered into an agreement with Farmers Na-
[fol. 50] tional Bank and Trust Company of Reading, hereinafter referred to as Farmers National Bank, national

banking associations organized and existing under and by virtue of the banking laws of the United States being then engaged in general banking business with principal offices and places of business in the City of Reading, County of Berks and State of Pennsylvania, wherein among other things, Reading National Bank and Penn National Bank in contemplation of a consolidation with Farmers National Bank agreed forthwith to transfer and assign all of their assets to Farmers National Bank with the right to hypothecate and rehypothecate any or all of such assets, but conditioned upon the assumption by Farmers National Bank of all the deposit liabilities as well as all other liabilities of said Reading National Bank and Penn National Bank excepting liabilities to stockholders as such, which agreement was duly accepted by said Farmers National Bank. A true and correct copy of said agreement is hereto attached, made part hereof and marked Exhibit "A".

7. On February 20, 1933 at the direction of the Comptroller of the Currency, said Reading National Bank together with Penn National Bank entered into a supplemental agreement with Farmers National Bank wherein said Reading National Bank and Penn National Bank guaranteed to the Farmers National Bank that the assets of their respective banks would in value exceed the deposit liability and other liabilities assumed by said Farmers National Bank by virtue of said agreement of February 17, 1933. A true and correct copy of said supplemental agreement is hereto attached, made part hereof, and marked Exhibit "B".

8. Prior to and at the time of the execution of said agree- [fol. 51] ment of February 17, 1933, said Reading National Bank was subjected to unusual withdrawals of deposit, resulting in a reserve deficiency and placing it on the verge of insolvency and because of such emergency the Board of Directors of said bank by resolution duly authorized the execution of said agreement of February 17, 1933 and the supplemental agreement of February 20, 1933.

9. On February 17, 1933 said Reading National Bank and Penn National Bank transferred and delivered to said Farmers National Bank all their assets, surrendered complete control and possession thereof, as well as their business, and in accordance with the provisions of said agree-

ment said Farmers National Bank appointed executive officers to conduct its business at the former places of business of said Reading National Bank and Penn National Bank under the designation of branches of said Farmers National Bank and thereafter with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives, ceased to exercise any control or dominion over their former assets and ceased to transact any business whatsoever.

10. At the time of the execution of said agreement of February 17, 1933, and the transfer and delivery of all of the assets to said Farmers National Bank, the assets of said Reading National Bank covered by said agreement and transferred and delivered as aforesaid consisted of cash on hand and due from banks, securities, loans and discounts, mortgage loans, real estate and other assets, of a value in excess of the liabilities assumed by said Farmers National Bank under said agreement of February 17, 1933 and February 20, 1933.

11. At the time of the execution of said agreement of [fol. 52] February 17, 1933, and the transfer and delivery of all the assets of said Reading National Bank to Farmers National Bank, the deposit liability together with all other liabilities of said Reading National Bank which were assumed by said Farmers National Bank consisting of demand deposits, time deposits, items due to bank, bills payable and rediscounts and all other liabilities, amounted to approximately $9,000,000.

12. Said Reading National Bank under said agreement of February 17, 1933, transferred and delivered to Farmers National Bank assets having a fair and reasonable value in excess of the deposit liability and all other liabilities of said Reading National Bank assumed by the Farmers National Bank, and said Reading National Bank duly performed and complied with all the terms and provisions of said agreement of February 17, 1933 and the supplemental agreement of February 20, 1933, by which said Reading National Bank guaranteed that its assets in value would exceed its deposit and all other liabilities assumed by said Farmers National Bank.

13. Under the terms and provisions of said agreement of February 17, 1933, and its due performance, as well as

the due performance of said supplemental agreement of February 20, 1933, said Farmers National Bank became liable to said Reading National Bank for the payment of all of its deposit liability and all other liabilities of said Reading National Bank, except liabilities to stockholders as such in the total amount of approximately $9,000,000, as well as liable to all depositors and other creditors of said Reading National Bank for the amounts of their respective claims.

14. Immediately upon the execution of said agreement [fol. 53] of February 17, 1933, said Farmers National Bank, with its combined resources and liabilities comprising its own original resources and liabilities and those derived from said Reading National Bank and Penn National Bank, carried on and conducted its regular banking business, commingled all its assets regardless of their source or origin and used the same indiscriminately in the conduct of its business and in the discharge of its obligations whether original or assumed.

15. On March 18, 1933, the Acting Comptroller of the Currency certified that said Farmers National Bank was unable to transact and carry on its ordinary banking business, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and that he deemed it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of depositors and other creditors, and thereupon appointed Wellington M. Bertolet, Conservator of said Farmers National Bank under the provisions of the Conservation Act of March 9, 1933.

16. Thereupon and on or about March 20, 1933, said Wellington M. Bertolet as such conservator, under the direction of the Comptroller of the Currency, took possession of the books, records and assets of every description of said Farmers National Bank, which included not only the original books, records and assets of said bank, but those acquired by said bank under the terms of said agreement of February 17, 1933, from said Reading National Bank and Penn National Bank, and thereafter said Wellington M. Bertolet as such conservator of said Farmers National Bank pursuant to his duty as such administered all the assets of said Farmers National Bank including the assets [fol. 54] which had been derived by said Farmers National

Bank from said Reading National Bank and Penn National Bank.

17. On or about October 10, 1933, said J. F. T. O'Connor, Comptroller of the Currency, without notice of any kind to said Reading National Bank, its depositors and other creditors, or the stockholders thereof, and without a hearing, and without warrant or authority of law or a decree or order of any Court of competent jurisdiction, made a ruling to the effect that said agreement of February 17, 1933 and February 20, 1933 were without legal effect, and directed that the transfer and delivery of assets and the assumption of liabilities thereunder should be disregarded, and attempted to allocate among the Farmers National Bank, Reading National Bank and Penn National Bank assets transferred and delivered theretofore to said Farmers National Bank.

18. Said defendant, J. F. T. O'Connor, Comptroller of the Currency, in pursuance of said ruling, thereupon under date of October 10, 1933, certified that said Reading National Bank and Penn National Bank were unable to transact and carry on their ordinary banking business, or to exercise their usual banking functions without prejudicing the rights of depositors and other creditors, and that he deemed it necessary to take immediate steps for the benefit of the depositors and other creditors thereof, and thereupon appointed Wellington M. Bertolet as conservator of the Reading National Bank, and said Wellington M. Bertolet as conservator of Penn National Bank, under the provisions of the Conservation Act of March 9, 1933.

19. Under the date of October 29, 1933, said defendant, J. F. T. O'Connor, Comptroller of the Currency, proposed a [fol. 55] so-called plan of reorganization of said Farmers National Bank, Reading National Bank and Penn National Bank, based upon his said ruling, providing for the organization of a new national bank and the issuance of stock and securities, a pledge of assets to secure a loan from the Reconstruction Finance Corporation, and a sale of the assets to the new national bank, and a division of the proceeds on the basis of 35% to Farmers National Bank, 25% to Reading National Bank and 25% to Penn National Bank, which division was arbitrary and based on a classification adopted from the report of the National Bank Examiners of April

24, 1933, and not on the basis of the financial condition of said banks as of the date of the execution of said agreement and the transfer of assets and assumption of liability thereunder, to wit, February 17, 1933.

20. Said Wellington M. Bertolet, as conservator of each of said banks, each of which had interest adverse to each other, in furtherance of the so called plan of reorganization arbitrar-y reconstructed the assets and liabilities of each of said banks as of April 24, 1933, made an arbitrary division thereof among each of said banks, made a sale in gross of certain assets and apportioned the proceeds thereof under the prearranged schedule of 35% to Farmers National Bank, 25% to Reading National Bank and 25% to Penn National Bank.

21. Said Wellington M. Bertolet as conservator of each of said banks, pursuant to instructions of, and in accordance with said ruling of said defendant, J. F. T. O'Connor, Comptroller of the Currency, abrogating said agreements of February 17, 1933 and February 20, 1933, and all rights and obligations thereunder, ignored and disregarded the claims [fol. 56] of Reading National Bank in the amount of approximately $9,000,000 against said Farmers National Bank in the reconstruction of the financial condition of said banks, upon which the so called plan of reorganization was based.

22. Said ruling of said defendant, J. F. T. O'Connor, Comptroller of the Currency, and his acts thereunder abrogating said agreements of February 17, 1933 and February 20, 1933, and all the rights and obligations accrued thereunder was beyond the powers conferred upon him under the National Bank Act or other statutory law, was an unlawful assumption of judicial powers neither delegated to him by statute nor capable of being delegated, and was in violation of the rights of said Reading National Bank, its depositors and other creditors and stockholders thereof, and deprived them of their property without due process of law.

23. After the completion of the so-called plan of reorganization of the three banks, said defendant, J. F. T. O'Connor, Comptroller of the Currency, certified that each of said banks was insolvent and unable to pay its just and legal debts, and thereupon, on October 27, 1934, appointed Harvey S. Adams as receiver for the Reading National Bank,

on November 8, 1934 appointed Edward C. Nolan as receiver for the Farmers National Bank and on November 26, 1934 appointed William H. McGowan as receiver for said Penn National Bank.

24. On January 15, 1935, said defendant J. F. T. O'Connor, Comptroller of the Currency, made an assessment upon the shareholders of said Reading National Bank, wherein he recited that upon a proper accounting by the Receiver to collect the assets of said bank, and upon a valuation of the uncollected assets remaining in his hands it appeared to his [fol. 57] satisfaction that in order to pay the debts of said bank, it was necessary to enforce the individual liability of the stockholders in accordance with the Act of Congress. A true and correct copy of such assessment is hereto annexed, made part hereof, and marked Exhibit "C".

25. Said defendant, J. F. T. O'Connor, Comptroller of the Currency, and said Wellington M. Bertolet, conservator first of said Farmers National Bank and later of said Reading National Bank, and said defendant Harvey S. Adams, receiver of said Reading National Bank, failed, neglected and refused to collect said claim of approximately $9,000,000 of said Reading National Bank against said Farmers National Bank, which was the only and ordinary resource of said Reading National Bank for the payment of its creditors, and on the contrary, without warrant or authority of law, cancelled, abrogated and waived said claim in fraud of the rights of said Reading National Bank, its depositors and other creditors and stockholders thereof, and by reason thereof failed to comply with the conditions and provisions of the National Bank Act upon which stockholders of a national bank may be assessed.

26. The alleged valuation of the remaining assets made by said defendant, J. F. T. O'Connor, Comptroller of the Currency, upon an alleged proper accounting, on which said assessment upon the stockholders of said Reading National Bank was made, excluded as an asset the said claim of Reading National Bank against Farmers National Bank of approximately $9,000,000 and involved a grave error of law based upon his unwarranted assumption of judicial power in abrogating, cancelling and waiving said claim of Reading National Bank against said Farmers National Bank, and

[fol. 58] adjudicating the private rights and obligations of parties not subject to his power and control, whereby the said assessment is invalid and illegal.

27. Plaintiffs are without an adequate remedy by any of the ordinary processes of law, and are prohibited by law from making a defense to such assessment on the grounds here alleged, and can secure redress only by interposition of a Court of equity in this proceeding.

28. Said defendant, Harvey S. Adams, receiver as aforesaid, under instructions from said defendant, J. F. T. O'Connor, Comptroller of the Currency, has notified all stockholders of said Reading National Bank that said assessment is payable on or before February 23, 1935, that those stockholders may have an extension who pay 25% of their said assessment on or before said date, and give their written obligation, satisfactorily guaranteed, to pay 25% on or before March 23, 1935, 25% on or before April 23, 1935, and 25% on or before May 23, 1935, Plaintiffs aver that said defendants unless restrained by this Honorable Court will institute actions against the shareholders who will be unable to make defense thereto on the ground of the invalidity and illegality of said assessments.

Wherefore plaintiffs pray as follows:

1. That said assessment of said defendant, J. F. T. O'Connor, Comptroller of the Currency, under date of January 15, 1935, in the matter of Reading National Bank and Trust Company upon the shareholders thereof for $600,000 be declared invalid, illegal and without warrant or authority of law.

2. That an injunction, preliminary to hearing and final thereafter, issue directed to said defendants, J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. [fol. 59] Adams, Receiver of Reading National Bank and Trust Company restraining them, and each of them, their agents and attorneys from instituting any proceedings at law or otherwise against said stockholders to enforce said assessment.

3. That a temporary restraining order issue until a motion for preliminary injunction may be heard.

4. For such other and further relief as to this Court may seem proper.

Stevens & Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Plaintiffs.

*Duly sworn to by J. Edwin Tobias et al. Jurat omitted in printing.*

I hereby certify that there has not been sufficient time within which to print the foregoing Bill of Complaint.

Lemuel B. Schofield.

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[fol. 60] EXHIBIT "A" TO COMPLAINT

Agreement

This agreement entered into this seventeenth day of February A. D. 1933, by and between Farmers National Bank and Trust Co. of Reading, Pennsylvania, of the First part, Reading National Bank and Trust Company of Reading, of the second part, and Penn National Bank and Trust Co. of Reading, state aforesaid, of the third part.

Witnesseth the parties hereto, in consideration of the mutual covenants, promises and agreements, of each of them to the other, hereby made, and for and in consideration of the sum of One Dollar by each to the other interchangeably paid, receipt whereof is by each of them hereby acknowledged.

Do hereby covenant, promise and agree to and with each other, as follows, to wit:

1. The said parties hereby agree to merge the three Companies under the name of Farmers National Bank & Trust Company of Reading in the manner hereinafter agreed upon.

2. A committee composed of a representative of each of the Companies shall be appointed forthwith by the Presidents of the respective Companies to act with Lybrand, Ross Brothers & Montgomery, Certified Public Accountants, for the purpose of valuing the assets of each of said companies at their fair valuation which shall be submitted to the Board of Directors of each of the Companies for approval.

3. When said valuations have been determined, the said accountants shall submit a plan for an adjustment of the capital structure of the Farmers National Bank and Trust Company of Reading, based on the said valuations and [fol. 61] thereupon such appropriate legal action as shall be necessary to effect a recapitalization of the combined companies shall be taken by each Company, the stockholders of the Reading National Bank and Trust Company shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies; the stockholders of the Farmers National Bank and Trust Co. of Reading shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies; and the stockholders of Penn National Bank and Trust Co. of Reading shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies.

4. This agreement is made subject to the approval of the Comptroller of the Currency, and all other Governmental authorities whose consent will be required to comply with all legal requirements.

5. The Reading National Bank and Trust Company and Penn National Bank and Trust Company of Reading shall forthwith execute all necessary documents to transfer and assign all of their assets to Farmers National Bank and Trust Co. of Reading with the right to hypothecate and rehypothecate any or all of such assets, but conditioned upon the assumption by Farmers National Bank & Trust Co. of Reading of all of the deposit liabilities of the companies as [fol. 62] well as all other liabilities thereof, except liability to stockholders as such, reserving the right to collect from the stockholders of Reading National Bank and Trust Co. and Penn National Bank and Trust Co. of Reading any liabilities which are owing or which may become owing by virtue of the ownership of their stock in the respective banks.

6. A meeting of the Board of Directors of Farmers National Bank and Trust Co. of Reading shall be held Fri-

day, Feb. 17, 1933, at nine o'clock A. M. to elect proper executive officers to conduct the business at the Reading National Bank and Trust Co. branches and at the Penn National Bank and Trust Company of Reading.

7. All legal papers shall be subject to the approval of the Counsel of the Farmers National Bank and Trust Company of Reading.

8. This agreement shall bind the parties thereto, their successors and assigns.

Farmers National Bank & Trust Co. of Reading, by Ferdinand Thun, Chairman of the Board; Chas. T. Cubellis, Asst. to President. Reading National Bank & Trust Company, by H. H. Harrison, President; W. G. Mast, Cashier. Penn National Bank & Trust Co. of Reading, by J. H. Hasbrouck, Presi-
[fol. 63] dent; Jere Hess Barr, Secretary; I. F. Impink, H. F. Kantner, Committee.

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EXHIBIT "B" TO COMPLAINT

Supplemental Agreement

This supplemental agreement entered into this 20th day of February, A. D., 1933 by and between Farmers National Bank & Trust Company of Reading, Pa., of the first part, Reading National Bank & Trust Company of Reading, of the second part, and Penn National Bank & Trust Company of Reading, state aforesaid, of the third part;

Whereas, the parties hereto entered into an agreement dated February 17th, 1933, and whereas the parties desire to supplement said agreement,

Now therefore, this agreement witnesseth

First, That the Penn National Bank and Trust Company of Reading and the Reading National Bank & Trust Company of Reading hereby guarantee to the Farmers National Bank & Trust Company of Reading That the assets of their respective banks will in value exceed the deposit liability and other liabilities assumed by the Farmers National Bank & Trust Company of Reading, by virtue of said Agreement of Feb. 17, 1933.

This agreement is executed by the officers of each of said banks, they having been duly authorized by their respective Board of Directors.

[fol. 64] Farmers National Bank & Trust Co. of Reading, —— ——, President; —— ——, Cashier. Reading National Bank & Trust Co. of Reading —— ——, President; —— ——, Cashier. Penn National Bank & Trust Co. of Reading, —— ——, President; —— ——, Cashier.

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EXHIBIT "C" TO COMPLAINT

Assessment Upon Shareholders

Treasury Department

Office of the Comptroller of Currency

No. 4887

In the matter of THE READING NATIONAL BANK AND TRUST Co., Reading, Pennsylvania

Washington, D. C., January 15, 1935.

To All Whom It May Concern:

Whereas upon a proper accounting by the Receiver heretofore appointed to collect the assets of The Reading National Bank and Trust Company, of Reading, Pennsylvania, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed in Section 5151, and 5234 of the Revised Statutes of the United States, Section 1 c 156, Act of June 30, 1876, and Section 23, [fol. 65] Act approved December 23, 1913, known as Federal Reserve Act.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Reading National Bank and Trust Company, Reading, Penna., for Six Hundred Thousand ($600,000) Dollars to be paid by them on or before the 23d day of February, 1935, and I hereby make

demand upon each and every one of them for the par value of each and every share of capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct H. S. Adams, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this 15th day of January, A. D. 1935.

J. F. T. O'Connor, Comptroller of the Currency.
(Seal.)

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IN UNITED STATES DISTRICT COURT

8527

SUBPŒNA IN EQUITY—Filed March 5, 1935

The President of the United States of America, to J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the [fol. 66] service of this subpœna at the Clerk's office of the United States District Court for the Eastern District of Pennsylvania, at Philadelphia to answer unto the bill of complaint of J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable The United States District Judges at Philadelphia this 23rd day of February A. D. 1935.

George Brodbeck, Clerk, by E. G. Johnson, Deputy Clerk.

Memorandum

The Defendants in this case are required to file an answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

## Return on Service of Writ

UNITED STATES OF AMERICA,
District of Columbia, ss:

I hereby certify and return, that on the 27th day of February, 1935, I received the within subpœna and served copy of the same, together with the bill of complaint in said case, on J. F. T. O'Connor, Comptroller of the Currency by personal service of the same on Gibbs Lyon, Deputy Comptroller of the Currency, February 27, 1935.

John B. Colpoy, United States Marshal, by Harry Callen, Deputy United States Marshal.

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[fol. 67] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed March 8, 1935

Comes now the defendant Harvey S. Adams, as Receiver of Reading National Bank and Trust Company, and respectfully moves this Honorable Court to dismiss the bill of complaint filed herein, upon the following grounds:

1. The said bill of complaint does not state facts sufficient to entitle plaintiff to any relief, there being no equity stated in the bill.

2. The said bill of complaint shows on its face that the levying of the assessment by the Comptroller of the Currency on the stockholders of the Reading National Bank and Trust Company as to which relief is sought, was done in pursuance of the administrative jurisdiction, discretion and judgment of the Comptroller of the Currency, and that the Comptroller of the Currency, in so acting, exercised the official discretion vested in him by law in the premises, and that this Court should not disturb such discretionary acts.

3. The said bill of complaint seeks to attack the validity and effect of acts performed by administrative and executive officers of the Federal Government within the course of their official discretion and duty.

4. Upon the facts covered in said bill of complaint this Court, in exercising its discretion as to the injunctive relief sought, should deny such relief and dismiss the bill.

5. The bill of complaint states no cause of action against this defendant, nor are the averments thereof sufficient to entitle plaintiffs to the relief sought.

[fol. 68] 6. The bill of complaint is multifarious.

7. The averments of said bill, upon which the right to the relief sought is based, are merely statements of conclusion of law and of fact.

8. The said bill shows on its face that it constitutes a collateral attack on the validity of the stock assessment levied by the Comptroller of the Currency in the course of his administrative discretion and authority.

9. The bill of complaint shows on its face that the stock assessment is valid and that the validity of such assessment can not be contested in this action.

10. The averments of said bill are to the effect that if certain alleged causes of action are pursued, or if certain alleged agreements are performed there will be no occasion or necessity for an assessment and that there will be sufficient to pay the creditors in full, all of which constitutes conclusions of law and of fact, and further constitutes an attempt to attack collaterally the finding by the Comptroller of insolvency of the bank and of the necessity for an assessment, the determination of all of which matters is vested by law exclusively in the Comptroller, whose determination of such matters is not open to attack or to review by this Court under the facts averred in said bill of complaint.

11. The said bill of complaint shows upon its face that the acts and matters complained of, as to which relief is sought, were embraced within the exclusive official and administrative jurisdiction, discretion and control of the Comptroller of the Currency, and that the Comptroller in so acting exercised the official and administrative discretion vested in him by law in the premises, and that this [fol. 69] Honorable Court is precluded from reviewing or disturbing the findings, conclusions and acts of the Comptroller of the Currency in such matters.

12. That said bill shows on its face that the plaintiffs have been guilty of laches.

13. That if such alleged merger had been effected the stockholders of the Reading National Bank and Trust Company would not have been legally entitled to notice, as is suggested in said bill of complaint (paragraph 19).

14. The bill of complaint shows on its face that this was not a legal consolidation under the Act of November 7, 1918, as amended, requiring the Comptroller's certificate of approval, nor does said bill show that the Comptroller was a party to said alleged merger, or that he authorized or consented to it, or that he ratified it, or that he officially or otherwise approved it.

15. And for other and further reasons apparent in said bill of complaint.

Harry R. Matten, Charles W. Matten, Charles E. Wainwright, Attorneys for Defendant, Harvey S. Adams, Receiver, Reading National Bank & Trust Co.

STATE OF PENNSYLVANIA,
County of Berks, ss:

Harvey S. Adams being duly sworn according to law, deposes and says that he is one of the defendants in the above case and that the foregoing Motion to Dismiss Bill of Complaint is not made for delay but because he verily [fol. 70] believes complainants have no legal cause of action.

Harvey S. Adams.

Sworn and subscribed to before me this Seventh day of March A. D. 1935. Kathryn G. Sauer, Notary Public. My commission expires March 5, 1937. (Seal.)

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IN UNITED STATES DISTRICT COURT

MOTION TO QUASH PROCESS—Filed March 8, 1935

Comes now J. F. T. O'Connor, as Comptroller of the Currency, defendant in the above entitled cause, by his attorneys, appearing solely for the purpose of challenging the jurisdiction of the Court over said defendant and for

no other purpose, and respectfully moves this Honorable Court to quash the subpœna and process issued in this cause on February 23, 1935, pursuant to which said defendant was served by the United States Marshal in and for the District of Columbia on February 27, 1935, and to dismiss said bill of complaint as to this defendant, upon the following grounds:

1. Service of process was not had on said defendant in the Eastern District of Pennsylvania.

2. Service of process on said defendant was not made by the United States Marshal for and in the Eastern District of Pennsylvania.

3. The said defendant is not an inhabitant or resident of the Eastern District of Pennsylvania within the purview of Title 28, Section 112 United States Code Annotated, which requires all civil suits to be brought in the district court of the district whereof the defendant is an inhabitant.

[fol. 71] 4. And for other reasons apparent of record.

Charles E. Wainwright, Harry R. Matten, Charles W. Matten, Attorneys for Defendant, J. F. T. O'Connor, Comptroller of the Currency.

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IN UNITED STATES DISTRICT COURT

APPEARANCE—Filed March 8, 1935

To the District Court of the United States for the Eastern District of Pennsylvania:

The Clerk of this Court will please enter our appearance de bene esse as attorneys for J. F. T. O'Connor, Comptroller of the Currency of the United States.

(Sgd.) Chas. W. Matten, Harry R. Matten, Attorneys for J. F. T. O'Connor, Comptroller of the Currency.

Dated: March 8, 1935.
To George Brodbeck, Clerk.

In United States District Court

Opinion sur Motion to Dismiss Bill of Complaint—Filed May 6, 1935

For the reasons stated in the opinion filed herewith in Nagle, et al. vs. O'Connor, Equity, No. 8525, this bill may be dismissed.

W. H. Kirkpatrick, J.

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[fol. 72] In United States District Court

Motion for Leave to File Amendment to Bill of Complaint—Filed May 29, 1935

And now, to wit, this 29th day of May A. D., 1935, come the plaintiffs, by their attorneys, and move the Court for leave to amend their Bill of Complaint, as follows:

1. By adding a new paragraph after Paragraph 14, and before Paragraph 15 of the Bill, to be designated as Paragraph 14 a, to read as follows:

14 (a) At the time of the execution of said agreement of February 17, 1933, the assets of said Farmers' National Bank were of a nature similar in character to those of said Reading National Bank, and had a book value of approximately $9,500,000, which after a deduction for depreciation of approximately $1,500,000, represented a fair and reasonable net market value of approximately $8,000,000, as against liabilities to creditors of approximately $9,000,000, and a liability to stockholders on its capital stock of $1,000,000; that the general claim of said Reading National Bank under said Agreement of February 17, 1935, included not only the obligation of said Farmers National Bank to said Reading National Bank and to the depositors and other creditors of said Reading National Bank, and also the liability of the stockholders of said Farmers National Bank to assessment on the capital stock of $1,000,000, but in addition the assets of said Reading National Bank transferred and delivered to Farmers National Bank as aforesaid, and the commingled assets of said Reading National Bank and Farmers National Bank, were subject to an equitable lien and charge in favor of said Reading National Bank and its

[fol. 73] creditors, and constituted a trust fund for their benefit, and the said general claim of the said Reading National Bank against the Farmers National Bank as thus constituted was then and now is more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities of said Reading National Bank without the necessity of any assessment upon the stockholders of the Reading National Bank.

2. By striking out the following words in Paragraph 19 of the Bill: "and a division of the proceeds on the basis of 35% to Farmers National Bank, 25% to Penn National Bank, and 25% to Reading National Bank," and in lieu thereof to insert "in consideration for which the new National Bank was to establish on its books lump sum credits for the benefit of the Conservator of each of said banks in an amount sufficient to permit a distribution to be made to the depositors and other creditors of each of said banks in the following percentages of the claims against each of said banks, 35% to Farmers National Bank, 25% to Penn National Bank and 25% to Reading National Bank."

(Sgd.) George C. Eaves, Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Plaintiffs.

And now, to wit, this — day of —— A. D. 1935, in consideration of the foregoing Motion, the Court grants leave to the plaintiffs to amend their Bill as therein stated.

——, J.

[fol. 74] IN UNITED STATES DISTRICT COURT

STIPULATION RE MOTION TO DISMISS—Filed September 9, 1935

It is hereby stipulated by and between the above-entitled parties, by their respective attorneys, that the motion to dismiss the original bill of complaint heretofore filed in the above entitled cause shall stand and be adopted and considered in all respects as a motion to dismiss the amended bill of complaint herein.

(Sgd.) George Eaves, Attorney for Plaintiffs.
(Sgd.) Charles E. Wainwright, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION TO AMEND BILL OF COMPLAINT, MOTION TO QUASH PROCESS AND REARGUMENT SUR MOTION FOR PRELIMINARY INJUNCTION

Before KIRKPATRICK, J.

The same order will be made in this case as in Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer vs. J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, No. 8525, December Term, 1934, for the reasons stated in a memorandum opinion filed in that case.

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[fol. 75] IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION TO DISMISS AND DENYING MOTION FOR PRELIMINARY INJUNCTION—Filed June 25, 1935

This cause coming on to — heard on April 15, A. D. 1935, on motion of defendant J. F. T. O'Connor, as Comptroller of the Currency, to quash service of subpœna and process, and upon motion of the defendant Harvey S. Adams, as Receiver of the Reading National Bank and Trust Company of Reading, to dismiss Plaintiffs' Bill of Complaint, and upon motion of plaintiffs for preliminary injunction, and further coming on to be heard on May 29, 1935, and on June 17, 1935, on motion for leave to amend the original bill of complaint herein, and said motions having been argued respectively by counsel in open court, and upon consideration thereof, it is by the Court this 25th day of June, A. D. 1935,

Ordered, adjudged, and decreed, that said motion for leave to amend the original bill of complaint herein, be and the same hereby is granted and that said motion to quash service of subpœna and process on defendant J. F. T. O'Connor, Comptroller of the Currency be and the same hereby is sustained, and that said motion to dismiss plaintiffs' amended bill of complaint filed herein be dismissed as to both defendants, and that defendants recover their proper costs and that plaintiffs be adjudged to pay all

proper costs incurred by said defendants in this cause, for which let execution issue; and it is further,

Ordered, adjudged and decreed, that plaintiffs' motion herein for a preliminary injunction be and the same hereby is denied.

(Sgd.) W. H. Kirkpatrick, United States District Judge.

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[fol. 76] In United States District Court

Order Directing That Opinion of Court Stand as Its Finding of Fact and Conclusion of Law—Filed July 22, 1935

And now, to wit July 20, 1935, on motion of the above-named plaintiffs, it is Ordered that the opinions of this Court rendered in the above-entitled suit on the motion to dismiss the bill of complaint herein, and the motion to quash the subpœna and set aside the service thereof, may stand as the findings of fact and conclusions of law in accordance with the provisions of Equity Rule 70½.

W. H. Kirkpatrick, J.

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In United States District Court

Order Allowing Amendments to Bill of Complaint Nunc Pro Tunc as of June 25, 1935—Filed August 5, 1935

And now, to wit, July 31, 1935, on consideration of the motion of plaintiffs for leave to file amendments to the bill of complaint herein as therein stated, said motion is granted, and said proposed amendments shall stand as amendments to said bill of complaint nunc pro tunc as of June 25, 1935.

W. H. Kirkpatrick, United States District Judge.

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In United States District Court

Assignments of Error—Filed August 5, 1935

Now come the plaintiffs in the above entitled cause and file the following assignments of error upon which they rely [fol. 77] in the prosecution of their appeal in the above

entitled cause from the Order and Decree made and entered by this Honorable Court on the 25th day of June, 1935.

1. The Court erred in sustaining the motion to dismiss the Bill of Complaint herein by deciding that the facts alleged do not entitle plaintiffs to relief.

2. The Court erred in sustaining the motion to quash service of process on the Comptroller of the Currency by deciding that the suit was brought by individuals and not by a national bank.

3. The Court erred in its conclusion as follows: (Supp. Op. par. 3)

"The whole basis of the bill is that the Comptroller's determination of the necessity for an assessment was incorrect."

4. The Court erred in not holding that the determination by the Comptroller as to the propriety and amount of an assessment on stockholders is subject to a direct attack by a suit in equity where such determination is beyond the authority of the Comptroller, violates the requirements of due process, or is arbitrary and capricious.

5. The Court erred in not holding that the determination by the Comptroller as to the propriety and amount of an assessment, is subject to the condition precedent that the ordinary resources of the bank be first exhausted, and a deficit thereby established.

6. The Court erred in not finding that the only and ordinary resources of the bank consisted of its rights under a valid contract with the Farmers' Bank covering the transfer of all assets to, and the assumption of all liabilities by, the Farmers' Bank, that said resources were more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities without the necessity of an assessment, that such resources had not been exhausted, and that no deficit in fact existed.

[fol. 78]

7. The Court, in failing to assume as true the facts properly alleged in the Bill of Complaint and amendments thereto, erred in its conclusion as follows: (Supp. Op. par. 3)

"The amendments however merely emphasize the thought expressed in the fourth paragraph of the opinion—namely,

that relief asked for necessarily depends upon an immensely complicated accounting by the Court in this proceeding to determine the question whether the Reading Bank was or was not really solvent at the time of the Comptroller's determination—a proceeding which obviously involves countless questions not only of fact but of law. For example the assets transferred to the Farmers National Bank would have to be valued; the assets and liabilities of the Farmers Bank itself would have to be considered in order to determine how much its alleged agreement to assume the deposit liabilities of the Reading Bank was worth; the agreement itself would have to be construed and the legal question whether or not it created an equitable lien in favor of the Reading Bank in the transferred assets would have to be determined."

8. The Court erred in not finding that the Comptroller without right or authority prior to the assessment made a ruling abrogating the valid contract between the bank and the Farmers' Bank and all rights thereunder, under which ruling the said contract and all rights thereunder were abandoned as assets of the bank without any attempt to [fol. 79] enforce, collect or value the same, and were ignored and disregarded in the making of the assessment by the Comptroller.

9. The Court erred in not holding that the assessment by the Comptroller was beyond his authority, violated the requirements of due process and was arbitrary and capricious.

10. The Court erred in its conclusion that the Bill of Complaint alleged fraud in general terms.

11. The Court erred in its conclusion as follows (Supp. Op., par. 3)

"Admittedly, if the bank was insolvent the Comptroller's determination was a correct one, no matter by what process he arrived at it."

12. The Court erred in its conclusion as follows: (Supp. Op. par. 3)

"The financial condition of the bank can never be estimated accurately except by the process above referred to and it is not the stockholders' right to demand this proceed-

ing until the time for it arrives in the final winding up of the bank's affairs."

Wherefore the appellants pray that said decree be reversed and for such other and further relief as may be proper.

George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants, by Lemuel B. Schofield.

August 5, 1935.

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[fol. 80] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL

To the Honorable Judges of the Said Court:

The above-named plaintiffs feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of June, 1935 do hereby appeal from said decree to the Circuit Court of Appeals for the Third Circuit for the reasons set forth in the assignments of error filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, under the rules of said court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them be made.

George Eves, Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Petitioners, by (Sgd.) Lemuel B. Schofield.

August —, 1935.

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ORDER ALLOWING APPEAL

Appeal allowed upon giving bond in the sum of $250., to be approved by the Clerk of the District Court, conditioned for the payment of costs on appeal.

August 9, 1935.

O. B. Dickinson, J.

[fol. 81] IN UNITED STATES DISTRICT COURT

CITATION—Filed August 9, 1935

UNITED STATES OF AMERICA, ss:

The President of the United States to J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, Eastern District of Pennsylvania, wherein J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, are appellants and you are appellees to show cause, if any there be, why the Decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable O. B. Dickinson, Judge of the District Court of the United States, this 9th day of August, in the year of our Lord one thousand and nine hundred and thirty-five.

(Sgd.) O. B. Dickinson, District Judge.

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STIPULATION

It is hereby stipulated by and between Stevens & Lee, Edw. D. Trexler, W. Bradley Ward, George Eaves and Lemuel B. Schofield, Attorneys for the appellants in the above entitled cause, and Charles E. Wainwright, attorney for appellee, that service of citation on appeal dated August [fol. 82] 9, 1935, is accepted as to the appellee J. F. T. O'Connor, Comptroller of the Currency of the United States, for the sole and only purpose of permitting a review on appeal of the action of the Trial Court in sustaining a motion of appellee O'Connor to quash service of subpoena and process.

It is further stipulated by and between Counsel for appellants and appellee that the service of said citation on appellee, so far as the appellee O'Connor is concerned, is

not to be construed as permitting a review of the case on the merits, and the acceptance of such service is to be limited to the purposes above stated, and no other.

(Sgd.) Stevens & Lee, Edward D. Trexler, George Eaves, W. Bradley Ward, Lemuel B. Schofield, Charles E. Wainwright, Attorney- for Appellee.

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In United States District Court

Stipulation and Order of Consolidation—Filed August 9, 1935

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the appeals in the above entitled suits be and the same are hereby consolidated, and that a joint record shall be printed, and that an order may be entered to that effect without any further notice.

George Eves, John B. Stevens, Harry W. Lee, Ed-
[fol. 83] ward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants, by (Sgd.) Lemuel B. Schofield. Chas. W. Matten, Chas. Wainwright, Attorneys for Appellees.

August 9th, 1935.

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Order

Before Dickinson, J.

It is ordered by this Court that Cause No. 8525 In Equity, entitled Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer, Plaintiffs vs. J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Defendants, and Cause No. 8527 In Equity, entitled J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, Plaintiffs vs. J. F. T. O'Connor, Comptroller of The Currency and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, Defendants, be and the same are hereby consolidated for the purpose of appeal, and that a joint record may be printed.

By the Court.

Attest:

Aug. 9, 1935. Leo A. Lilly, Deputy Clerk.

[fol. 84] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD—Filed September 9, 1935

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to an appeal allowed in the above entitled proceedings, and to include in such transcript the following:

1. Bill of Complaint.
2. Duplicate Original Subpoena.
3. Return of Service of Duplicate Original Subpoena.
4. Motion to Dismiss Bill of Complaint.
5. Motion by J. F. T. O'Connor, Comptroller, to Quash Subpoena.
6. Appearance de bene esse of Charles W. Matten and Harry R. Matten for J. F. T. O'Connor, Comptroller.
7. Opinion, Kirkpatrick, Jr., dismissing Bill of Complaint.
8. Motion for leave to file Amendment to Bill of Complaint.
9. Stipulation of counsel regarding motion to dismiss amended bill of complaint.
10. Opinion, Kirkpatrick, J., granting leave to amend Bill and granting Motion to Quash Process.
11. Decree of June 25, 1935 granting leave to amend Bill, granting Motion to Quash Service of Process, denying Motion for Preliminary Injunction and dismissing Bill of Complaint with costs.
12. Order of Court directing that Opinions of Court stand as its findings of fact and conclusions of law.
13. Order of Court allowing Amendments to Bill of Complaint nunc pro tunc.

[fol. 85-86] 14. Assignments of Error.

15. Petition for Appeal and Order allowing same.
16. Citation on Appeal and acknowledgment of Service.
17. Stipulation of counsel regarding appellee J. F. T. O'Connor, Comptroller of the Currency.
18. Docket Entries.
19. Praecipe for Transcript.
20. Certificate of Clerk.

and file said transcript with the Clerk of the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants.

Aug. 26, 1935.

We hereby acknowledge receipt of a copy of the Praecipe for Record of which this is the original.

(Sgd.) Chas. W. Matten, Charles E. Wainwright, Attorneys for Appellees.

August 27, 1935.

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Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1936

No. 5949

GENEVA M. NAGLE et al., Appellants,

vs.

J. F. T. O'CONNOR, Comptroller of the Currency, et al., Appellees

No. 5950. March Term, 1936

J. EDWIN TOBIAS et al., Appellants,

vs.

J. F. T. O'CONNOR, Comptroller of the Currency, et al., Appellees

And afterwards, to wit, the 12th day of March, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 10th day of March, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 88] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1936

No. 5949

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY and WILLIAM M. MAYER, Plaintiff-Appellants,

v.

J. F. T. O'CONNOR, Comptroller of the Currency, and WILLIAM H. McGOWAN, Receiver of Penn National Bank and Trust Co. of Reading, Defendants-Appellees

No. 5950. March Term, 1936

J. EDWIN TOBIAS, RALPH S. HILL and OSCAR P. SMITH, Plaintiff-Appellants,

v.

J. F. T. O'CONNOR, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank & Trust Company of Reading, Defendants-Appellees

OPINION—Filed March 10, 1937

Appeals from the United States District Court for the Eastern District of Pennsylvania

Before Buffington, Davis and Thompson, Circuit Judges

[fol. 89] DAVIS, Circuit Judge:

These cases involve the validity of a levy by the Comptroller of an assessment of 100 per cent. on the stockholders of two national banks, the Penn National Bank and the Reading National Bank of Reading, Pennsylvania, hereinafter called the Penn Bank and the Reading Bank. They involve the same question of law and were tried together in the District Court and argued together here.

The real question is whether or not in making the assessment the Comptroller transcended the power and authority conferred upon him by Congress.

On February 17, 1933, the Penn Bank and the Reading Bank entered into an agreement with the Farmers National

Bank and Trust Company of Reading, Pennsylvania, hereinafter called the Farmers Bank, wherein the Penn Bank and the Reading Bank agreed to consolidate with and under the name of the Farmers Bank. The Penn and Reading Banks were forthwith to transfer all of their assets to the Farmers Bank upon the condition that it would assume all liabilities of every kind of the Penn and Reading Banks except liabilities of stockholders as such. The Penn and Reading Banks immediately ceased doing a banking business and transferred all of their assets, which are alleged to have been more than enough to pay their liabilities, to the Farmers Bank which, however, did not pay, as it had agreed to do, the liabilities of the other two banks, but went on conducting a banking business with the combined assets of the three banks until March 18th, 1933 when William M. Bertolet was appointed conservator for it. He took possession of the assets of the Farmers Bank which included those coming from the Penn Bank and the Reading Bank, and carried on the banking business of the Farmers Bank, commingling all the assets of the three banks and using them indiscriminately to discharge the obligations of the Farm-[fol. 90] ers Bank, until October 10, 1933, when the Comptroller "abrogated" and set aside the contract between the banks of February 17, 1933, and attempted to allocate among the three banks the assets then belonging to the Farmers Bank. He certified on that day that the Penn Bank and the Reading Bank were unable to transact and carry on business and appointed Bertolet conservator for each of them.

He continued as conservator for each of the three banks until October 27, 1934 when the Comptroller certified that each of the three banks was insolvent and unable to pay its just and legal debts and appointed receivers for each of them.

On January 15, 1935 he levied an assessment of 100 per cent. of their individual liability upon the stockholders as follows:

"To All Whom It May Concern: Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of The Penn National Bank and Trust Company, of Reading, Pennsylvania, and upon a valuation of the uncollected assets remaining in his hands, it appears to my

satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed in Section 5151 and 5234 of the Revised Statutes of the United States, Section 1 c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Penn National Bank and Trust Company, of Reading, Pennsylvania, for One Million ($1,000,000.) Dollars, to be paid by them on or before the 23rd day of February, 1935, and I hereby make demand upon each and every one of them for the par value of each [fol. 91] and every share of capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Wm. H. McGowan, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders."

The crux of this case centers in the right of the Comptroller to abrogate and set aside the contract in accordance with which the Penn and Reading Banks conveyed their assets to the Farmers Bank, in consideration for which the Farmers Bank agreed to pay the obligations of the other two banks. There is no allegation anywhere that the banks were then, February 17, 1933, insolvent though they may have been in imminent danger. It is nowhere alleged that the directors of the banks in entering into that agreement were not acting in good faith and for the best interest of all of the banks. There is no hint that the agreement was in any way fraudulent.

Under these circumstances, it was beyond the power of the Comptroller, eight months afterward by mere ipse dixit, to set aside the contracts between the banks and proceed as though they had never been made. Wannamaker v. Edisto National Bank of Orangeburg, 62 Fed. (2nd) 696. Congress did not give him such power. No principle of law, which, in our opinion, authorizes the Comptroller to do this has been cited by counsel or the court below.

The authority to levy an assessment upon the stockholders is contained in section 192 of the National Bank Act, which provides that:

"* * * Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it and, upon the order of a Court of Record of competent jurisdiction, may sell [fol. 92] or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the Court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings. * * *"

The Comptroller has power to decide when and to the extent it is necessary to enforce the liability of stockholders. These are matters within his administrative discretion and his determination of these questions is ordinarily conclusive and may not be judicially reviewed. Kennedy v. Gibson, et al., 75 U. S. 498, 505. But in reaching his conclusion as to this necessity, he may not act arbitrarily, capriciously and in entire disregard of the provisions of the statute. Stockholders are only conditionally liable for the debts of the bank "after all the ordinary resources of the bank have been exhausted". Bank v. Kennedy, 84 U. S. 19; In United States v. Knox, 102 U. S. 422, the court said:

"In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by all the stockholders; 2, the amount of the deficit to be paid after exhausting all the assets of the bank; 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value."

It is the policy of the government to wind up the affairs of insolvent banks speedily and justly and notwithstanding the language in the above case and similar language in other [fol. 93] cases, the Comptroller is not obliged to wait until all the assets of an insolvent bank are literally "exhausted"

before he determines the necessity of enforcing individual liability of the stockholders. Miller v. Stock, et al., 65 Fed. (2d) 773; Kennedy v. Gibson, 75 U. S. 498; Studebaker v. Perry, 184 U. S. 258; Korbly v. Springfield Institution for Savings, 245 U. S. 330, 333. If he were compelled thus to wait, it would delay the winding up of banks too long and this might cause great loss to creditors of the banks because many stockholders might in the meantime become insolvent or remove their property beyond the reach of the Comptroller.

But no case has gone so far as to hold that the Comptroller may entirely disregard the statutory provisions for winding up an insolvent bank and arbitrarily, and in violation of law, enforce the individual liability of stockholders. But this is exactly what the Comptroller did in this case. He abrogated and set aside valid contracts between the banks and did not take into account, when he made the levy, the contract obligation of the Farmers Bank to pay "all the deposit liabilities, except liability to stockholders as such", but with administrative fiat, without notice to the banks, without a hearing and without due process of law, he stripped the banks of their only assets, which, it is alleged and not denied, were sufficient to pay all the debts of the banks without the necessity of making an assessment, and thereupon substituted the portion of the assets of the Farmers Bank, to which he thought under changed conditions and materially different circumstances the other two banks would be entitled at that time. He thus without authority and contrary to law tried to create a new situation upon which he determined the necessity of enforcing individual liability of stockholders.

There were no answers filed to the bills in these cases. The motions to dismiss them have the effect of a demurrer [fol. 94] and all the facts properly alleged are admitted. While some of the allegations may be conclusions of law or inferences of fact, the following may be taken as admitted:

1. The only assets of the two banks are their claims against the Farmers Bank.

2. These claims are sufficient to pay the debts of the two banks without the necessity of an assessment.

3. The Comptroller refused to resort to these claims and use them to pay the debts of the two banks.

The bill alleges in the case of the Penn Bank that the assets transferred to the Farmers Bank had at that time a fair value of over $6,500,000 and after depreciation had a fair and reasonable net market value of more than $350,000 over its liabilities. It is alleged in the bill that the assets transferred to the Farmers Bank by the Reading Bank on February 17, 1933 in accordance with the agreement had "a fair and reasonable value in excess of the deposit liabilities of said Reading National Bank". The motions admit the truth of these allegations.

It is well settled that an assessment upon stockholders to enforce individual liability may not be attacked collaterally. Kennedy v. Gibson, 75 U. S. 498; Casey v. Galli, 94 U. S. 673. But when the head of a department exceeds his authority, abrogates valid contracts and proceeds as though such contracts had never been made, he may be restrained by injunction which is a direct attack upon his acts and is the recognized mode of procedure by which the wrongful action of the executive head of a department may be restrained. "Where the terms and meaning of an act of Congress are plain, and a court is convinced upon reason and authority [fol. 95] that a correct determination of the question before it requires a decision contrary to the construction and practice of the officers of an executive department of the government, that determination must prevail, and that decision must be rendered. The courts cannot lawfully renounce their judicial powers in favor of opinions of officers of other departments." Where the administrative order of an executive head is based upon a clear error of law, fraud or mistake, it may be avoided by a direct attack. Deweese v. Smith et al. 106 Fed. 438, 445; United States v. Knox, 102 U. S. 422; Swift Company v. United States, 105 U. S. 691; Merritt v. Cameron, 137 U. S. 542; Noble v. Union River Logging Railroad Co., 147 U. S. 165, 172; United States v. Tanner, 147 U. S. 661, 663; Webster v. Luther, 163 U. S. 331, 342; School of Magnetic Healing v. McAnnulty, 187 U. S. 94.

The Comptroller exceeded his power and authority when he abrogated and set aside the contracts between the Farmers Bank on the one side and the Penn Bank and the Reading Bank on the other.

His motions to dismiss the bills admit the allegations that the claims of the Penn and Reading Banks against the Farm-

ers Bank are more than sufficient to pay their indebtedness without the necessity of making an assessment.

Under these circumstances the Comptroller has no authority to levy an assessment against the appellants. They are invalid and the orders dismissing the bills of complaint and denying preliminary injunctions are reversed.

BUFFINGTON, J., dissenting:

These cases involve the levying by the Comptroller of a 100% assessment on the shareholders of two national banks in the hands of receivers. In each case the court below dis- [fol. 96] missed a bill in equity brought by a stockholder praying an injunction restraining the receiver from collecting such assessment.

The facts of the case are that the Penn National Bank & Trust Company of Reading, hereafter called Penn, and the Reading National Bank & Trust Company, hereafter called Reading, were national banks. On February 17, 1933, these two banks entered into a written agreement with the Farmers National Bank and Trust Company, also a national bank, and hereafter called Farmers, for a consolidation of Penn and Reading with Farmers, the latter agreeing to pay all obligations of Penn and Reading. This agreement was followed by a transfer by Penn and Reading of all their assets to Farmers and the latter assumed control of them. Thereafter Penn and Reading ceased doing business. On March 18, 1933, the Comptroller appointed a conservator for Farmers, who administered the assets of all three banks until October 10, 1933, when the Comptroller directed that the agreements of consolidation should be disregarded and then appointed conservators for Penn and Reading. The bill alleges he had no power at law to so order and that he has disregarded and failed to enforce the claim of Penn and Reading against Farmers—for which latter a receiver was appointed—as have also the receivers of Penn and Reading. The receivers of Penn and Reading have proceeded to collect and administer the returned assets and on January 15, 1935, the Comptroller made the assessment complained of, in which he recited (italics mine):

"Whereas, upon a proper *accounting by the Receiver* heretofore appointed to collect the assets of The Penn National Bank and Trust Company, of Reading, Pennsyl-

vania, and upon a *valuation of the uncollected assets* remaining in his hands, it appears to my satisfaction that in order [fol. 97] to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed in Section 5151 and 5234 of the Revised Statutes of the United States, Section I c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act,"

It therefore appears the receivers have collected the assets of said banks and on the basis of what has been collected and the valuation of those not collected (which would include the alleged claims of Penn and Reading against Farmers) it was necessary to assess the shareholders 100%. In that regard the court below stated:

"Granted that the Comptroller should have taken the situation as it existed when the Bank closed instead of proceeding to undo and unscramble the assets, there is absolutely nothing to show that, as a matter of assets and liabilities, these stockholders have suffered by the method adopted by the Comptroller. Whether the agreement of the Farmers Bank to pay deposit liabilities was worth more or less than the assets which were allocated in its place is not shown. Inferentially, it would not appear to have been worth its face value since the Farmers Bank was also in receivership and is now in process of reorganization,"

and accordingly held:

"It is perfectly clear from the later decisions that it was never meant that the stockholders could institute an inquiry into the correctness of the Comptroller's determination, and proceed to fix the amount of their liability as on an accounting, by a proceeding in equity, pending which, suits are to be stayed. Such interpretation would utterly defeat the [fol. 98] whole purpose of the policy involved which is to 'expeditiously and justly wind up the affairs and the paying of debts of National Banks'."

Its so holding was in line with decision of this court in Miller v. Stock, 65 Fed. (2d) 773, and the Supreme Court cases there cited. Regarding the dismissal of the bill was

rightly ordered by the court below, I am constrained to dissent.

A true Copy. Teste:
——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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[fol. 99] In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1936

No. 5949

Geneva M. Nagle et al., Appellants,

vs.

J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Appellees.

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of June 25, 1935 of the said District Court in this cause be, and the same is hereby reversed, with costs.

Philadelphia, March 10, 1937.
J. Warren Davis, Circuit Judge.

Endorsements: Order Reversing Order of June 25, 1935. Received & Filed Mar. 10, 1937. Wm. P. Rowland, Clerk.

[fol. 100] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1936

No. 5950

J. EDWIN TOBIAS et al., Appellants,

vs.

J. F. T. O'CONNOR, Comptroller of the Treasury, and Harvey S. Adams, Receiver of Reading National Bank & Trust Co., Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of June 25, 1935 of the said District Court in this cause be, and the same is hereby reversed, with costs.

Philadelphia, March 10, 1937.

J. Warren Davis, Circuit Judge.

Endorsements: Order Reversing Order of June 25, 1935. Received & Filed Mar. 10, 1937. Wm. P. Rowland, Clerk.

[fol. 114] In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1936

No. 5949

Geneva M. Nagle et al., Appellants,

vs.

J. F. T. O'Connor, Comptroller of the Currency, et al., Appellees

Sur Petition for Rehearing

And Now, to wit, April 19, 1937, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Per Curiam Buffington, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed Apr. 19, 1937. Wm. P. Rowland, Clerk.

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[fol. 115] In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1936

No. 5950.

J. Edwin Tobias et al., Appellants,

vs.

J. F. T. O'Connor, Comptroller of the Currency, et al., Appellees

Sur Petition for Rehearing

And Now, to wit, April 19, 1937, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Per Curiam Buffington, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed Apr. 19, 1937. Wm. P. Rowland, Clerk.

[fol. 116] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the cases of Geneva M. Nagle et al., Appellants, vs. J. F. T. O'Connor, Comptroller of the Currency, et al., Appellees, No. 5949; J. Edwin Tobias et al., Appellants, vs. J. F. T. O'Connor, Comptroller of the Currency, et al., Appellees, No. 5950, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of April, in the year of our Lord one thousand nine hundred and thirty-seven and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 123

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

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[fol. 118] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 124

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

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Endorsed on cover: Enter Brice Clagett. File Nos. 41,604, 41,606. U. S. Circuit Court of Appeals, Third Circuit. Term No. 123. Harvey S. Adams, Receiver, Penn National Bank and Trust Company of Reading, Pennsylvania, petitioner, vs. Geneva M. Nagle, Ralph S. Hill, James H. Pangelly and William M. Mayer. Term No. 124. Harvey S. Adams, Receiver, Reading National Bank and Trust Company of Reading, Pennsylvania, petitioner, vs. J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith. Petition for writs of certiorari and exhibit thereto. Filed June 8, 1937. Term Nos. 123, O. T., 1937, 124, O. T., 1937.